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773  
No. 2182

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**United States Circuit Court of Appeals  
for the Ninth Circuit.**

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RUSSO-CHINESE BANK, (a Corpora-  
tion),

*Plaintiff in Error.*

vs.

THE NATIONAL BANK OF COM-  
MERCE OF SEATTLE, WASHING-  
TON,

*Defendant in Error.*

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**TRANSCRIPT OF RECORD**

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**Upon Writ of Error to the United States District Court  
for the Western District of Washington,  
Northern Division.**

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Lowman & Hanford Co., Seattle

**FILED**





Records of U. S. Circuit  
Court of appeals  
773





No.

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RUSSO-CHINESE BANK, (a Corporation),

*Plaintiff in Error.*

vs.

THE NATIONAL BANK OF COMMERCE OF SEATTLE, WASHINGTON,

*Defendant in Error.*

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## TRANSCRIPT OF RECORD

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**Upon Writ of Error to the United States District Court  
for the Western District of Washington,  
Northern Division.**



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*In the Circuit Court of the United States for the Western  
District of Washington. Northern Division.*

RUSSO-CHINESE BANK (a Corpora- tion),	}	No. 1517.
<i>Plaintiff in Error,</i>		
vs.		
NATIONAL BANK OF COMMERCE OF SEATTLE,		
<i>Defendant in Error.</i>		

*Names and Addresses of Counsel,*

T. L. STILES, Esq.,  
Fidelity Bldg., Tacoma, Washington.

MESSRS. CHICKERING & GREGORY,  
Of Counsel, San Francisco, Cal., and

DORR & HADLEY of Seattle,  
Attorneys for Plaintiff in Error.

G. E. de STEIGUER, Esq.,  
New York Bldg., Seattle, Washington,

MESSRS. KERR & McCORD,  
Hoge Bldg., Seattle, Washington,  
Attorneys for Defendant in Error.

## COMPLAINT.

*In the United States Circuit Court, Western District of  
Washington. Northern Division.*

RUSSO-CHINESE BANK (a Corpora- tion),	} <i>Plaintiff,</i>	No. 1517.
vs.		
NATIONAL BANK OF COMMERCE OF SEATTLE,	} <i>Defendant.</i>	

Now comes the above-named plaintiff and complains of the above-named defendant, and for cause of action alleges:

## I.

That the plaintiff at all the times hereinafter mentioned was, and it now is, a banking corporation organized and existing under the laws of the Empire of Russia, and had, and now has, its principal place of business at St. Petersburg, Russia, and had in the years 1903 and 1904, a branch bank at Port Arthur in the Empire of China.

## II.

That the defendant, at all the times hereinafter mentioned, was, and it now is, a corporation organized under the national banking laws of the United States, and had and now has its place of business at Seattle, King County, Washington.

## III.

That on or about the 11th day of December, 1903, the defendant remitted to plaintiff's branch bank at Port Arthur, China, a certain draft in writing, drawn by the Centennial Mill Company upon Clarkson & Co., at Port Arthur, China, requiring said Clarkson & Co. to pay, ninety days after date, to the holders of said draft the sum of thirty-six thousand one hundred and ninety-four dollars and eighty cents, with interest from date of acceptance at six per cent per annum, ex-



change and collection fees. Said draft was duly endorsed so as to authorize plaintiff's said branch bank to collect the same, and was remitted to plaintiff's said branch bank for collection, and remittance of the proceeds thereof to defendant, at Seattle, Washington.

#### IV.

That said draft was duly received by plaintiff's said branch bank at Port Arthur, China, on or about the 18th day of January, 1904, and was, by said branch bank, presented to said Clarkson at Port Arthur, on the 30th day of January, 1904, and was then and there accepted by said Clarkson and his acceptance duly written thereon.

#### V.

That said draft became due and payable ninety days after said acceptance on the 30th day of January, 1904, which was the 30th day of April, 1904; but that by the law of Russia then in effect in commercial transactions in said city of Port Arthur, and by the custom of merchants and bankers therein, the acceptor of a foreign draft was entitled to two days' grace for the payment of said draft, after the due date thereof, excluding Sundays, and whereas, the said 30th day of April, 1904, fell upon Saturday, the said Clarkson Co. was entitled to and including the 2d day of May, 1904, in which to pay said draft.

#### VI.

That said draft was not paid by said Clarkson & Co. on said 2d day of May, 1904, or at all; and thereupon plaintiff's said branch bank caused said draft to be duly protested for non-payment by the Notary of said city of Port Arthur.

#### VII.

That at all the times mentioned in 1903 and 1904, the Empire of Russia and the Empire of Japan were at war, and said Port Arthur, China, was on or about the 4th day of May, 1904, completely invested and surrounded by hostile troops of Japan engaged in said war, so that from said 4th day of May, 1904, for a long time, said Port Arthur and the inhabitants

thereof, and the plaintiff's said branch bank were compelled to suspend all ordinary business transactions, and were unable to receive or send out any communication by mail, whereby plaintiff's said branch bank was unable to mail to defendant any advise of the non-payment of said draft, or to return said draft and the protest thereof to defendant until on or about the 26th day of May, 1904.

### VIII.

That on or about the 26th day of May, 1904, plaintiff's said branch bank at Port Arthur did mail to defendant, at Seattle, Washington, notice of the non-payment of said draft, together with the said draft, and the official protest of the said notary thereof.

### IX.

That thereafter and on or about the first day of January, 1904, the said Port Arthur was captured by the armies of Japan, engaged in said war, and the armies of Japan took possession of plaintiff's said branch bank, and took from plaintiff's agents in charge thereof, all of the books, records, and papers of said branch bank, including all of its books, records and papers having reference to said draft and retained the same, so that plaintiff had no access thereto, or knowledge of the contents thereof, for the space of more than one year.

### X.

That while said books, records and papers of plaintiff's said branch bank at Port Arthur were thus in the possession of the said armed forces of Japan, and before they had been recovered by plaintiff, defendant represented and claimed to plaintiff that said draft had never been returned to defendant and that it had been paid in full to plaintiff's said branch bank at Port Arthur, and that the proceeds of said draft and the money paid thereon by said Clarkson & Co., had been retained by plaintiff's said branch bank, and demanded from plaintiff the payment to it of the full amount of said draft, and threatened to sue plaintiff in the courts of the United States, where plaintiff had property subject to levy and sale, if the same should not be forthwith paid.

## XI.

That thereupon and on the 9th day of November, 1904, plaintiff being without information as to the payment or non-payment of said draft, and without means of information thereof, and to avoid the said threatened suit, and to keep unstained its honor as a bank, paid to defendant the sum of thirty-six thousand and thirteen dollars and seventy cents, upon condition, nevertheless, that if it should thereafter be ascertained that said draft had not been paid, the said sum should be repaid to it by defendant, to which condition defendant assented and agreed in writing.

## XII.

That thereafter and on or about the 5th day of December, 1904, defendant also demanded of plaintiff that it further pay to defendant the sum of two thousand two hundred and ninety-eight dollars and forty-nine cents, as interest on said draft from the date of its acceptance by said Clarkson & Co. to the 9th day of November, 1904, when plaintiff paid to it said sum of \$36,113.70; and that thereupon plaintiff did pay to defendant, on the 29th day of December, 1904, the further sum of \$2,298.49, under like conditions as to repayment, as were made and agreed to by defendant upon the payment to it of said sum of \$36,113.70.

## XIII.

That subsequent to said payments plaintiff recovered the books, records and papers of its said branch bank at Port Arthur, and the books, records and papers covering said draft, from the said armed forces of Japan, and then first obtained certain information that said draft had not been paid by said Clarkson, or at all, but that it had been duly protested for non-payment and returned, with the official protest, to defendant; and thereupon plaintiff demanded from defendant the payment to it of the said sums of \$36,113.70 and \$2,298.49; but defendant has wholly failed, neglected and refused to pay said sums, or either of them, or any part thereof to plaintiff, and the whole thereof is now due, owing and unpaid.

Whereof, plaintiff prays judgment against defendant for the said sum of \$36,113.70 with interest thereon at the lawful

rate from the 9th day of November, 1904, and for the further sum of \$2,298.49 with interest thereon at the lawful rate from the 16th day of December, 1904, and for its costs and disbursements herein.

T. L. STILES,  
Attorney for Plaintiff.  
CHICKERING & GREGORY,  
Of Counsel.

State of Washington,  
County of Pierce—ss.

T. L. Stiles, having been first duly sworn on oath says: That he is attorney for the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof, and he believes the same to be true; and affiant further says that he makes this verification on behalf of plaintiff for the reason that neither the plaintiff, which is a corporation, nor any of its officers, are at the date hereof, within the State of Washington.

T. L. STILES.

Subscribed and sworn to before me this 19th day of April, 1908.

(Seal) EUGENE CARR,  
Notary Public, Pierce County, Washington, Residing at  
Tacoma.

Endorsed: Complaint. Filed in the U. S. Circuit Court, Western Dist. of Washington. Apr. 20, 1907. A. Reeves Ayres, Clerk. W. D. Covington, Dep.

*In the Circuit Court of the United States for the Western  
District of Washington. Northern Division.*

RUSSO-CHINESE BANK (a Corpora- tion),	} Plaintiff,	No. 1517.
vs.		
NATIONAL BANK OF COMMERCE OF SEATTLE,	} Defendant.	

### AMENDED ANSWER.

Comes now the defendant above named, and with leave of Court first had and obtained, files this, its amended answer to plaintiff's complaint, and for cause of answer alleges:

#### I.

Answering the first paragraph of said complaint, this defendant says it has neither knowledge or information sufficient to form a belief as to the truth or falsity of the matters and things therein stated, and therefore denies the same and each and every part thereof.

#### II.

Answering the second paragraph of said complaint, this defendant admits the same.

#### III.

Answering the third paragraph of said complaint, this defendant admits that on or about the 11th day of December, 1903, the defendant remitted to the plaintiff's branch bank at Port Arthur, China, a certain draft in writing, drawn by the Centennial Mill Company upon Clarkson & Company for \$36,194.80 in gold, together with interest from date at 6% per annum, with exchange and collection fees and that said draft was duly endorsed so as to authorize plaintiff's said branch bank to collect the same, and that same was remitted to plaintiff's said branch bank for collection and remittance

of the proceeds thereof to the defendant at Seattle, Washington. Defendant denies that said draft was to bear interest from the date of acceptance, but alleges that it was to bear interest from the date of the draft; that said draft, with the endorsements thereon, was substantially as follows:

"Exchg for  
G \$36,194.80.

Seattle, Washington, December 11th, 1903.

Ninety (90) days after sight of this First of Exchange (Second unpaid) pay to the order of The National Bank of Commerce thirty-six thousand one hundred ninety-four & 80/100 Dollars with exchange and collection charges, value received, and charge the same to account of

CENTENNIAL MILL COMPANY,  
By M. THOMSEN, President.

GOLD

1 To Clarkson & Company,  
Port Arthur, China.

No. 1559.

Payable at the Bank's demand rate of exchange on New York at due date, together with interest at six per cent per annum from date of this bill to estimated date of return of remittance in Seattle, Washington.

Pay Banque Russo Chinoise or order

THE NATIONAL BANK COMMERCE

Seattle, Washington.

By R. R. SPENCER, Cashier."

#### IV.

Answering the fourth paragraph of said complaint, this defendant admits that said draft was duly received by plaintiff's said branch bank at Port Arthur China, but as to whether same was received by said branch bank on or about the 18th day of January, this defendant has neither knowledge nor information sufficient to form a belief, and therefore denies the same; and in this connection says, that in the ordinary course of business said draft should have been received by the plaintiff on or about the 10th day of January,



1904, and therefore alleges that it was received on January 10th, 1904.

Further answering said paragraph, this defendant admits that said draft was not presented to Clarkson & Company at Port Arthur, China, prior to the 30th day of January, 1904; but as to whether said draft was accepted by said Clarkson & Company and their acceptance written thereon, this defendant has neither knowledge nor information sufficient to form a belief and therefore denies the same.

#### V.

Answering the fifth paragraph of said complaint, this defendant says that it has neither knowledge nor information sufficient to form a belief as to the truth or falsity of the matters and things therein set forth, and therefore denies the same and each and every part thereof.

#### VI.

Answering the sixth paragraph of said complaint, this defendant denies the same and each and every part thereof.

#### VII.

Answering the seventh paragraph of said complaint, this defendant admits that during a portion of the year 1904 the Empire of Russia and the Empire of Japan were at war. Further answering said paragraph, this defendant says it has neither knowledge nor information sufficient to form a belief as to the matters and things therein stated, and therefore denies the same and each and every part thereof, and specifically denies that said draft and the protest thereof, or either of them, were returned to the defendant on the 26th day of May, 1904, or at all; and in this connection alleges that said draft and said alleged protest thereof were never returned by plaintiff to this defendant.

#### VIII.

Answering the eighth paragraph of said complaint, this defendant denies the same and each and every part thereof.

## IX.

Answering the ninth paragraph of said complaint, this defendant says it has neither knowledge nor information sufficient to form a belief as to the truth or falsity of the matters and things therein stated, and therefore denies the same and each and every part thereof.

## X.

Answering the tenth paragraph of said complaint, this defendant admits that it represented to the plaintiff that said draft had never been returned to defendant and that it was informed that the same had been paid in full to plaintiff's said branch bank at Port Arthur, China; admits that it demanded from plaintiff payment to the defendant of the full amount of said draft, and admits that it threatened to sue plaintiff in the courts of the United States if the same should not be paid. Defendant denies that the books, records and papers of the plaintiff's said branch bank at Port Arthur were, at the times mentioned in said paragraph in the possession of the armed forces of Japan.

## XI.

Answering the eleventh paragraph of said complaint, this defendant denies that on the 9th day of November, 1904, or at any other time plaintiff was without information as to the payment or nonpayment of said draft, or any part thereof, and denies that plaintiff at said times in said paragraph XI mentioned, or at any other time, was without means of information thereof, and denies that plaintiff was at any time without information thereof. Defendant denies that said payment was made to avoid a threatened suit; admits that plaintiff paid to the defendant the sum of \$36,113.70, but denies that said payment was made to keep unstained its honor as a bank. Defendant denies that said payment was made upon the condition that if it should thereafter be ascertained that said draft had not been paid, the said sum should be repaid to it by the defendant, and denies that the defendant agreed or assented in writing, or at all, to any such condition as stated in said paragraph XI; and in this connection al-

leges: That the defendant agreed upon its part, upon the return to the defendant of both sets of bills and a showing that the said draft had not been paid, to reimburse the plaintiff for the sum paid to the defendant, provided that said defendant was in no wise injured by the negligence of the plaintiff in connection with the collection of said draft or in the performance of its duties, or in the handling of said draft, or the documents connected therewith; and alleges that no showing of nonpayment of said draft has ever been made by the plaintiff to the defendant; and further alleges that both sets of bills have not been returned to the defendant, and that neither set of bills or any bill at all has ever been returned to this defendant by the plaintiff covering the transaction referred to in said paragraph XI; and alleges that the plaintiff has never fulfilled or performed the said conditions agreed upon by the plaintiff and the defendant at the time the said payment of \$36,113.70 was made.

## XII.

Answering the twelfth paragraph of said complaint, this defendant admits that upon the payment, on or about the 9th of November, 1904, of the said sum of \$36,113.70, the defendant demanded the payment of the further sum of \$2,298.49 on account of the interest upon said draft, and alleges that the same was paid by the plaintiff to the defendant under like conditions and under like agreement on the part of the defendant for the reimbursement of the plaintiff as stated in the foregoing answer of the defendant to the eleventh paragraph of plaintiff's complaint.

## XIII.

Answering the thirteenth paragraph of said complaint, this defendant admits that prior to the commencement of this action, plaintiff demanded from the defendant the repayment to it of the sum of \$36,113.70 and the further sum of \$2,298.49; admits that defendant has refused to pay the plaintiff the said sums or either of them or any part thereof. Defendant denies that subsequent to said payment, or at any other time, the plaintiff recovered the books, papers and records of its said branch bank at Port Arthur, China, or the

books, papers and records covering said draft from said armed forces of Japan; and in this connection alleges that all of the books, papers and records of said branch bank at Port Arthur, and all the books, papers and records covering draft were at all times under the control of the plaintiff, and that the same were never under the control of the armed forces of Japan, or under the control of the Japanese. Defendant further denies that said draft was duly protested for non-payment or protested at all for nonpayment, and denies that said draft was ever returned to this defendant with said protest and denies that said draft was ever returned at all to this defendant. Defendant denies that the plaintiff ever received any information whatsoever that the said draft had not been paid by Clarkson & Company, and alleges that said draft was paid by Clarkson & Company to the plaintiff's branch bank at Port Arthur, and that such fact was at all times well known to the plaintiff.

For a further and first affirmative defense to plaintiff's complaint, this defendant alleges, that on or about December 11th, 1903, Centennial Mill Company, a corporation, drew a certain draft for \$36,194.80, payable in gold, upon Clarkson & Company at Port Arthur, China, payable to the order of the defendant, and that the said draft was duly endorsed by the said defendant to the order of the plaintiff and forwarded by the defendant in the ordinary course of business to the plaintiff at Port Arthur, China, which said draft is set forth in *haec verba* in the foregoing answer of the defendant, which is hereby referred to and made a part of this affirmative defense, and that thereafter said draft was paid in full by Clarkson & Company to the plaintiff and that the plaintiff received from the said Clarkson & Company payment in full for said draft.

For a second and further affirmative defense, this defendant alleges that said draft, hereinbefore set forth, dated December 11th, 1903, was drawn by the Centennial Mill Company upon Clarkson & Company at Port Arthur, China, to cover the purchase price of thirty-six thousand three hundred and twelve (36,312) sacks of flour shipped on or about December 11th, 1903, by Centennial Mill Company from Seattle,

Washington, to Port Arthur, China, on the steamer "Hyades" a steamship operated by the Boston Steamship Company and the Boston Towboat Company; that the said flour was delivered to the said steamer and a bill of lading was issued therefor by the said Boston Steamship Company and Boston Towboat Company about December 11th, 1903, to Centennial Mill Company, the Centennial Mill Company being named both consignor and consignee in said bill of lading; that the said bill of lading, with insurance papers and other documents, were assigned to the defendant and attached to the draft and that said draft was accompanied by said bill of lading and documents when the same was endorsed and assigned by the defendant to the plaintiff at Port Arthur, China, and the plaintiff was instructed by the defendant to deliver the said bill of lading and documents to Clarkson & Company at Port Arthur, China, upon the payment of the said draft.

That by reason of the assignment of said draft and said documents by the defendant to the plaintiff, it became the duty of the plaintiff under the custom among bankers at Oriental ports, including the port of Port Arthur, China, and under the law merchant, to present said draft for acceptance upon its arrival; that the plaintiff did not present said draft for acceptance upon the day of its arrival or the succeeding day, and did not present the draft for acceptance for several weeks thereafter, after an unreasonable delay; that it also became the duty of the plaintiff, under the custom of bankers, as above stated, to look after, protect and care for the flour represented by the bill of lading upon its arrival at Port Arthur; that it was the duty of said plaintiff to warehouse the said flour and to insure the same, and that it became to the duty of the plaintiff, by reason of the instructions given to plaintiff by the defendant, and by reason of the custom among bankers, not to permit the said flour represented by said bill of lading to be appropriated by Clarkson & Company or anyone else.

That the plaintiff claims said flour represented by said bill of lading was appropriated by Clarkson & Company to their own use and the proceeds of the same were not applied to the payment of said debt or any part thereof.



The defendant further alleges that if the proceeds of the sale of said flour were not used and applied toward the payment of said draft, the failure to have the same applied toward the payment of said draft was due to the carelessness and negligence of the plaintiff and was due to a breach of duty that the plaintiff owed to the defendant to cause the said flour or the proceeds thereof to be utilized for the payment of said draft, and that any failure to have the proceeds of said flour applied to the payment of said draft, if said proceeds were not so applied, was due to the gross carelessness and negligence on the part of the plaintiff, for which this defendant is in no wise responsible; that the plaintiff did not protest said draft at the date of its maturity, as required by the law merchant and did not return the draft and the documents accompanying same, all without excuse or reason, and indefinitely held the same to the great injury and damage of this defendant, all of which was a gross breach of the duty owed by the plaintiff to the defendant as hereinabove stated.

Wherefore, defendant prays that it may be dismissed hence with its costs and disbursements in this action expended.

KERR & McCORD,  
Attorneys for Defendant.

State of Washington,  
County of King—ss.

Ralph S. Stacy, being first duly sworn, upon oath deposes and says: That he is the Vice-President of The National Bank of Commerce, the defendant in the above-entitled action; that he has read the foregoing Amended Answer, knows the contents thereof, and believes the same to be true.

RALPH S. STACY.

Subscribed and sworn to before me this the 16th day of October, A. D. 1907.

(Seal) LEROY V. NEWCOMB,  
Notary Public in and for the State of Washington, Residing  
at Seattle.

Endorsed: Amended Answer. Filed in the U. S. Circuit Court, Western Dist. of Washington. Oct. 16, 1907. A. Reeves Ayres, Clerk. A. N. Moore, Dep.



*In the Circuit Court of the United States for the Western  
District of Washington. Northern Division.*

RUSSO-CHINESE BANK (a Corpora- tion),	} Plaintiff,	No. 1517.
vs.		
NATIONAL BANK OF COMMERCE OF SEATTLE,	} Defendant.	

### REPLY.

Now comes the above-named plaintiff, and replies to the Amended Answer of the defendant herein, as follows:

#### I.

Denies that defendant's agreement to repay to plaintiff the said sums of \$36,113.70 and \$2,298.49, was conditioned upon the return of both sets of bills, and a showing that the said draft had not been paid, or that defendant was in no wise injured by the negligence of plaintiff in connection with the collection of said draft, or in the performance of its duties or in the handling of said draft, or the documents connected therewith; and denies that no showing of the nonpayment of said draft has ever been made by plaintiff to defendant, and alleges to the contrary that it has frequently made such showing;

#### II.

Plaintiff denies each and every allegation contained in defendant's second and further affirmative defense commencing at line 26, on page 7 of said Amended Answer, and continuing to the end of said affirmative defense.

And for a further and affirmative reply to the defendant's said second and further affirmative defense, plaintiff alleges:

#### I.

That the said transaction was, in fact a shipment of said flour, by said Centennial Mill Company to said Clarkson &

Company for sale, and that said Clarkson & Company was the agent of the said Boston Towboat Company and Boston Steamship Company, at Port Arthur, for the landing and storage of goods shipped on board of said steamship "Hyades"; and that said Centennial Mill Company and defendant well knew that upon the arrival of said steamship "Hyades" at Port Arthur, said flour would be delivered from said steamship into the keeping and possession of said Clarkson & Company, as such agent, whether said draft was paid or not, and that whether said Clarkson & Company would thereafter appropriate said flour, before payment of said draft, was entirely at the discretion of said Clarkson & Company, and was not within the control of this plaintiff.

Wherefore plaintiff having fully replied to defendant's answers, prays as in its complaint herein.

T. L. STILES,  
Attorney for Plaintiff.  
CHICKERING & GREGORY,  
Of Counsel.

State of Washington,  
County of Pierce—ss.

T. L. Stiles being first duly sworn, on oath deposes and says: That he is the attorney for the plaintiff in the above-entitled action; that he has read the foregoing reply and knows the contents thereof, and that he believes the same to be true. Defendant corporation has no officer or agent within the District of Washington at the date hereof.

T. L. STILES.

Subscribed and sworn to before me this 31st day of October, 1907.

(Seal) ANTHONY M. ARNSTON,  
Notary Public for Washington, Residing at Tacoma, Pierce  
County.

State of Washington,  
County of Pierce—ss.

T. L. Stiles, having been first duly sworn, on his oath says: I am the attorney for the plaintiff in the above-entitled ac-

tion. On the 31st day of October, 1907, I served the within reply upon the defendant's attorneys, Messrs. Kerr & McCord, by mailing to them a true copy of said reply enclosed in a sealed envelope postage prepaid deposited in the United States Postoffice, at Tacoma, in said District, and addressed to Kerr & McCord, Mutual Life Building, Seattle, King County, Washington.

T. L. STILES.

Subscribed and sworn to before me this 31st day of October, 1907.

(Seal)

ANTHONY M. ARNSTON,  
Notary Public for Washington, Residing at Tacoma, Pierce  
County.

Endorsed: Reply. Filed in the U. S. Circuit Court, Western Dist. of Washington. Nov. 1, 1907. A. Reeves Ayres, Clerk. R. M. Hopkins, Dep.

*In the United States District Court for the Western District  
of Washington. Northern Division.*

RUSSO-CHINESE BANK, a Corpora- tion,	} Plaintiff,	} No. 1517.
vs.		
THE NATIONAL BANK OF COM- MERCE OF SEATTLE, a Corpora- tion,	} Defendant.	

### JUDGMENT.

This action came on regularly for trial. Said parties appeared by their attorneys, T. L. Stiles, C. W. Dorr and Chickering & Gregory appearing for the plaintiff and Kerr & McCord appearing for the defendant.

A jury of twelve persons was regularly impanelled and sworn to try said action. Witnesses on the part of the plaintiff and the defendant were sworn and examined.

After hearing the evidence, arguments of counsel and instructions of the Court the jury retired to consider of their verdict, and subsequently returned into Court with a verdict, which said verdict consisted of a special verdict and a general verdict. The special verdict, omitting the caption, was in the words and figures as follows, to-wit:

"We, the jury in the above-entitled action, do find for the defendant. Charles Osner, Foreman."

The special verdict, omitting the caption, was in words and figures following, to-wit:

"We, the jury in the above-entitled cause, find that the Port Arthur Branch of the Russo-Chinese Bank did receive payment for the draft dated December 11th, 1903, on account of which the plaintiff made the remittance to the defendant alleged in the complaint. Charles Osner, Foreman."

WHEREFORE, by virtue of the law and by reason of the premises aforesaid, it is by the Court

ORDERED, ADJUDGED and DECREED, That the plaintiff take nothing by its complaint and that the defendant National Bank of Commerce of Seattle, do have and recover of and from the plaintiff, Russo-Chinese Bank, judgment for its costs and disbursements in this action expended, amounting to the sum of One Hundred and 30/100 Dollars. (\$100.30).

Done in open court this the 18th day of June, A. D. 1912.

C. H. HANFORD, Judge.

Indorsed: Judgment. Filed in the U. S. District Court, Western Dist. of Washington. June 18, 1912. A. W. Engle, Clerk. By S., Deputy.

*In the District Court of the United States for the Western  
District of Washington. Northern Division.*

RUSSO-CHINESE BANK (a Corpora- tion),	} Plaintiff,	Circuit No. 1517.
vs.		
NATIONAL BANK OF COMMERCE OF SEATTLE,	}	

### PLAINTIFF'S BILL OF EXCEPTIONS.

Be it remembered that on the 23rd day of February, 1912, the above-entitled cause came on for trial before the above-named court and a jury duly empanelled, Honorable C. H. Hanford, District Judge, presiding; the plaintiff appeared by Messrs. T. L. Stiles, Warren Gregory and C. W. Dorr, its counsel, and the defendant appeared by E. C. McCord, and the following proceedings were had:

Mr. Gregory made an opening statement to the jury on behalf of the plaintiff.

It was agreed between counsel that the corporate character of the Russo-Chinese Bank and the defendant should be taken as admitted.

Thereupon the plaintiff read in evidence the deposition of Alexander Friedberg, taken and certified before the Honorable James W. Ragsdale, United States Consul at St. Petersburg, Russia, and certified by him in his official capacity, as follows:

Interrogatory 1. State your name, age, residence and occupation.

Answer. Name, Alexander Friedberg, thirty-one years old, officer of the Russo-Chinese Bank, St. Petersburg, holding power of attorney.

And he further said: I resided from January 1/14, 1904, till July 17/30, 1904, in Port Arthur; on the last date I left Port Arthur for Chefoo, China, where I resided until the close of that year. While I was in Port Arthur I was an officer of the Russo-Chinese Bank, holding a power of attorney for the Port Arthur and Dalny branches of the bank, and my duty

was to supervise the affairs of the above-named branches. My duty was to control the bank's books; I did not keep them. The bank kept books of account of all its transactions, including also the transactions involving the collection of drafts forwarded to it by other banks. Its books were kept correctly.

In the early part of 1904 it has a transaction involving the collection of drafts sent to it for collection by the National Bank of Commerce of Seattle, Washington, U. S. A. In 1904, it received several drafts drawn upon Clarkson & Co. from the National Bank of Commerce of Seattle for collection. In January, 1904, it received a draft for \$36,194.80, drawn by the Centennial Mill Co. upon Clarkson & Co., payable 90 days after sight. This draft was received on January 9/22, 1904. This draft was presented by the bank to Clarkson & Co. on or about January 10/23, 1904.

Clarkson & Company accepted said draft on January 17/30, 1904.

The bank notified the National Bank of Commerce that said draft had been accepted by letter dated January 17/30, 1904. No. 1903.

When the draft was received by the bank it was accompanied with bills of lading, insurance policy, and sale bill for 35,312 sacks of flour shipped by S. S. "Hyades." These documents were kept in the safe of the bank at the disposal of the National Bank of Commerce of Seattle until payment of the draft by Clarkson & Co.

At the maturity of the draft Clarkson & Co. had not paid the amount of the draft to the bank or any part of it; and the bank sent the draft to the Public Notary of Port Arthur, asking him to call for payment of same and in the event of refusal to protest the draft for nonpayment.

In the months of April and May, 1904, there existed a condition of war at Port Arthur. The war was going on between Russia and Japan. In April, 1904, the Japanese troops landed near Port Arthur (on the Kwantung peninsula). On April 21, Russian style, May 4th, American style, the Japanese troops cut the communications by land and as the Japanese fleet had blockaded Port Arthur since January 27th, Russian



style, February 9th, American style, 1904, the communication with Port Arthur ceased.

Clarkson & Co., merchants of Port Arthur, were buying and selling different kinds of goods. They were agents for several insurance and other companies and also engaged in shipping in quality of agents for different steamship companies. I did not know about any connection between Clarkson & Co. and the Boston Steamship Co. and the Boston Towboat Company in 1903 and 1904.

In April, 1904, and at the request of the representative of the Centennial Mill Co. of Seattle who was in Shanghai at that time, the bank at Port Arthur made inquiries regarding the "Hyades" flour; and then I learned that Clarkson & Co. were the agents for the S. S. "Hyades" of the Boston Steamship Co. and the Boston Towboat Co.

Interrogatory 23. State all that you know about the flour shipped per S. S. "Hyades" to Clarkson & Co. against which the draft for \$36,194.80 was drawn.

Answer. It was not the bank's business to look after the flour shipped per S. S. "Hyades" to Clarkson & Co., against which the draft was drawn for \$36,194.80. It was also not the business of the bank to examine either the quality or quantity of the flour, the bank not being Commissioner for the purchase or sale of it. The bank could also not prevent the discharging of the cargo, not being empowered to do so by the National Bank of Commerce of Seattle.

Clarkson & Co. were the shipper's (The Centennial Mill Co.) assigns, as may be seen from the bill of lading accompanying this draft.

(Witness includes copy of letter, Plaintiff's Exhibit One, see post, page —) and proceeds,

According to these instruments of the National Bank of Commerce of Seattle, the bank had to present the draft for \$36,194.80 drawn at 90 days' sight to Clarkson & Company for acceptance, and to keep the accepted draft with documents at the disposal of the National Bank of Commerce of Seattle until the maturity of the draft; in case of non-payment of said draft to protest and return it to the National Bank of Commerce of Seattle, holding also the documents at the disposal

of the said bank. I can only suppose that the "Hyades" flour was discharged by Clarkson & Co., as they were the agents of the S. S. "Hyades" which arrived in January, 1904, at Port Arthur.

After the capitulation of Port Arthur, the Japanese military officers took possession of the books, papers, effects and property of the Russo-Chinese Bank and retained the same until March, 1906.

Having applied several times to the Japanese Government for permission to go to Port Arthur for the supervision of the said books, papers and effects, I received the permission from the Japanese Government to go to Port Arthur only in February, 1906, and having taken the necessary steps before the Japanese authorities, I finally succeeded in recovering them in March, 1906. The bank had no access to the said books, papers and effects while they were in the possession of the said Japanese military forces.

The said books, papers and effects are now in St. Petersburg, in the offices of the Russo-Chinese Bank.

There is a difference between the Russian calendar and the calendars of other countries (English or United States) of thirteen days. For instance the 17th day of April, according to the Russian calendar, would be the 30th day of April in English or United States.

The laws of the Russian Empire were in force at Port Arthur in 1903 and 4.

The Russian law as to days of grace on bills of exchange was in force in Port Arthur.

There were no consuls of other countries or institutions besides the Russian authorities having jurisdiction at Port Arthur. And according to the Russian law the drawee has two days' grace besides Sundays and holidays during which time protest is suspended.

Interrogatory 33. If you have before you the books of the Russo-Chinese Bank at Port Arthur covering the time of 1904 and 5, and containing entries referring to the transaction of the draft of the Centennial Mill Company upon Clarkson & Co. for \$36,194.80 about which you have already been interrogated, please exhibit to the officer taking your deposition

the entries in said books referring to said draft and have a copy of such entries in the Russian language together with a translation thereof attached to your deposition.

Answer. Yes, I have before me the books of the Russo-Chinese Bank at Port Arthur covering the time of 1904 and 5. I beg to attach an identified copy of the entry of the draft of the Centennial Mill Co. upon Clarkson & Co. for \$36,194.80 and an identified translation thereof into English which you have compared with the original book I have exhibited to you.

Interrogatory 35. If you have before you any letter copy-book of the Russo-Chinese Bank at Port Arthur containing any letters or telegrams addressed or forwarded by said bank to the National Bank of Commerce of Seattle please exhibit.

Answer. Yes, I have a copy of all letters addressed and forwarded by the Russo-Chinese Bank to the National Bank of Commerce of Seattle since 1902. The letters were copied in general copy-books for divers clients of the former branch of the Russo-Chinese Bank at Port Arthur. The said copy-books are here exhibited. See Exhibits "A," "B," "C," "D," which are certified to be true copies.

Interrogatory 36. Please refer to any part of the bank's records which you can identify and which contains an account of the disposition of the draft upon its non-payment.

Answer. I beg to attach identified copies with translation thereof into English of a letter dated April 19th, 1904, addressed by the Bank at Port Arthur to the Notary of the city of Port Arthur directing to produce the draft for \$36,194.80 for payment to Clarkson & Co. and in the event of refusal to protest the same. Also an identified copy of letter dated May 13/26, 1904, addressed to the National Bank of Commerce of Seattle with which the protested draft for \$36,194.80 was returned. Also a correct extract with English translation from the original book of the Russo-Chinese Bank, Port Arthur Branch, called Bills for Collection, page 27, for the year 1904, showing that the draft for \$36,194.80 was returned on May 13th, 1904, to the National Bank of Commerce of Seattle. And the documents attached to the said draft were returned on June 14/27, 1906, to the Russo-Chinese Bank at San Fran-

cisco. Now the said documents are in my possession. Here follow copies of papers referred to.

7889 Port Arthur, the 19th of April, 1904.

To the Notary of the City of Port Arthur, Present.

Dear Sir,—We beg you hereby to present for payment and in the event of refusal to protest the bills of exchange annexed herewith.

No. in numerical order	No of the bills of exchange.	In whose name.	Against whom to be protested.	Date of Maturity of the bills of exchange.
1	11364	R. C. B.	A. Michailovsky	19/IV
2	7646	L. Kaialoff	Tun-Sun-Sjan Co.	"
3	5908	G. Borman Sty	Zozunoff	18/IV
4	7035	Centennial Mill Co.	Clarkson & Co.	17/IV

Amount of the bills of ex-  
change.

Remarks.

Roubles C.

300 —  
587 82  
863 57  
71.665 70

at the rate of exchange of date  
198 Gold Dollars 36,194.80.

Yours truly,

RUSSO-CHINESE BANK.

A. OVSIANKIN

A. FRIEDBERG.

13/26th May, 1904.

National Bank of Commerce, Seattle, Wash.

Your rem'ce for coll. 11/XII-03 No. 1559/7035 G\$36194.80  
pr 17/IV-1904 D/P on Clarkson & Co. Port Arthur.

Dear Sirs,—This had to be protested for non-payment and is herewith returned together with its deed of protest. Kindly acknowledge receipt and remit on our account to the First National Bank of your city Rbs. 566.25. sundry charges as per following description, thus obliging.

Rbs.271.50	$\frac{3}{8}\%$ comm.
" 184.25	protest
" 2.—	carriage fare.
" .50	postage
" 108.—	billstamp.

---

Rbs.566.25.

The reason of dishonor is that the goods have not been landed here. The shipping docts. are being kept here pending receipt of your instructions.

Yours faithfully,

RUSSON-CHINESE BANK

(Port Arthur Branch.)

A. D. MAMONOFF

p. p. A. FRIEDBERG.

Enclosed :

one bill (first)

one bill (second)

one deed of protest.

For Extract from book "Bills for Collection," see Post, p. —.

I personally knew Mr. A. Belinsky, who was Public Notary at Port Arthur in the months of April, May, 1904.

Interrogatory 39. Produce and attach to your deposition any official record made by said A. Belinsky of his action concerning said draft, and if same is in the Russian language have a correct translation of the same into English had and attach original and translation to your deposition.

Answer. I beg to attach the official record of the bills of exchange presented at the offices of A. Belinsky, Public Notary, of Port Arthur during April, 1904, Russian style. Also a correct extract from it, Page 6, No. 179, concerning the draft for \$36,194.80 with the translation thereof into English. Said extract is as follows :

In the month of April of the year 1904.

Page 6.

Who issued the	On whom	Against	For what	In whose	Date
bills of ex-	drawn.	whom is	sum.	name pro-	of the
change.		made the	Roubles	tested.	pro-
		protest.	cop.		test.

179

Centennial Mill	Clarkson	Transfer	71.665 70	Centen-	20
Co.	& Co.	Clarkson		nial Mill	
		& Co.		Co.	

Interrogatory 41. State what you know, if anything, of the payment to the Russo-Chinese Bank at Port Arthur by or for account of Clarkson & Co. of the sum of about 67,000 roubles on or about April 30th, 1904.

Answer. On April 17/30, 1904, according to the cash-book of the Russo-Chinese Bank, Port Arthur, of same date the representative of Clarkson & Co. cashed a check endorsed by him, No. 1156, dated April 16, 1904, for 67,000 roubles, drawn by M. Ginsburg & Co. on their account with the Russo-Chinese Bank at Port Arthur. On the same date Clarkson & Co. paid to the bank (1) the equivalent of the draft, No. 1412/6386 for G.\$4,136 received from the National Bank of Commerce of Seattle, plus 6% interest on the same for 220 days=G.\$151.65=G.\$4,387.65, at the rate of 198=8489 roubles and 55 cop. (2) The equivalent of the draft No. 455/6500 for G.\$16,155.20 received from the National Bank of Commerce of Seattle, plus 6% interest on the same for 200 days, G.\$538.50=G.\$16,693.70, at the rate of 198=33053 roubles, 53 cop. (3) Expenses on the said drafts, bill stamps commission, telegram expenses and postage, 305 rbls. 80 cop. (4) That part to the credit of their own account with the Russo-Chinese Bank at Port Arthur 25,151 roubles 12 cop.

Of course the bank could not enforce Clarkson & Co. to apply their money in one way or another and was obliged to merely follow their client's instructions. The proceeds of the draft 6386/1412 and 6500/1455 G.\$20,981.35 were remitted on the same date to the National Bank of Commerce of Seattle by telegraphic transfer on Ladenburg, Thalmann & Co., New York. At that time the value of 67,000 roubles represented about \$33,838.88 United States currency, at the rate of 198.

On the 17/30 day of April, 1904, the bank at Port Arthur had in its portfolio besides the draft for \$36,194.80 the documents which were attached to the following drafts of the Centennial Mill Co. drawn upon Clarkson & Co.: 1. G.\$4136,



due February 27th, 1904, Russian style. 2. G.\$16,155.20 due March 8, 1904, Russian style. 3. G.\$23,468.40 drawn 90 days' sight. All these drafts had the following stamp "Payable at the Bank's demand, rate of exchange on New York at date together with interest at 6% per annum from date of this draft to estimated date of return of remittance in Seattle, Washington." The amount of the drafts G.\$4136 and G.\$16,155.20 was paid with interest as stipulated on the 17/30 April, 1904, and the amount of G.\$20,981.35 remitted to the National Bank of Commerce of Seattle by telegraphic transfer on Ladenburg, Thalmann & Co. of New York. The draft for \$23,468.40 was not accepted by Clarkson & Co. and had to be protested for non-acceptance on May 23d, June 5th, American style, 1904, and returned together with the deed of protest for non-acceptance to the National Bank of Commerce of Seattle on June 7/20, 1904.

I do not know out of what funds Clarkson & Co. paid the drafts mentioned above, but I presume that Clarkson & Co. applied a part of the money cashed from the bank at Port Arthur against M. Ginsburg & Company's check for 67,000 roubles on the same day.

Being cross-examined, the witness answered:

I was connected with the Russo-Chinese Bank at Port Arthur since August, 1901, and was holding the power of attorney for that branch since December, 1901. I did not personally keep the books of the Russo-Chinese Bank of Port Arthur during the latter part of the year 1903 and until the month of June, 1904, but merely supervised the keeping of the books.

The bank at Port Arthur kept a special book for all bills of exchange received for collection with documents or without them. As soon as a bill of exchange was received it was entered in the general book "Bills of Exchange for Collection." In that book was noticed the date of receipt, the current number of the bill in numerical order, the number given by the remitter or indicated on the bill, the date of the letter of the remitter relating to the bill, the name of the firm of the remitter, and town of the remitter, and kind of documents relating to the bill, the drawer of the bill, the town of the drawer, the date of the issue of the bill, the drawee, if a sight draft, and notice of the

time presentment was made, the date of maturity, the instructions of the remitter, the amount of the draft and date of payment or return of the draft. If a sight draft was accepted by the drawee the date of maturity was noticed in the book.

Attached to the drafts of the Centennial Mill Company upon Clarkson & Co. for G\$4136, G\$16,155.20, G\$36,194.80, and G\$23,468.40 there were attached bills of lading, sales bills and insurance policies, or certificates of marine insurance effected.

To the draft for \$36,194.80 drawn by the Centennial Mill Co. upon Clarkson & Co. there were attached the following documents: Original and duplicate of the bills of lading, No. 569 for 35,312/4 sacks of flour shipped by S. S. "Hyades" to the port of Port Arthur or Dalny, issued by the Boston Steamship Co. and Boston Towboat Co., Seattle, on Dec. 9th, 1903; original and duplicate of the Certificate of the Fireman's Fund Insurance Co. of San Francisco No. 52,459, for G\$40,000, on 35,312/4 sacks "Russo-Chinese" flour shipped on board the "Hyades" from Seattle to Port Arthur or Dalny and issued in Seattle December 11th, 1903, and a copy of the bill of sale issued by the Centennial Mill Co. to Clarkson & Co. for 35,312/4 sacks "Russo-Chinese" flour for G\$36,194.80, with letter of the 13/26 May, 1904. The bank at Port Arthur, when returning the above said draft with deed of protest for non-payment, informed the National Bank of Commerce of Seattle that the documents attached to the draft G\$36,194.80 were kept at the disposal of the remitter. When said documents were recovered from the Japanese authorities at Port Arthur and sent to the head office of the Russo-Chinese Bank at St. Petersburg, the latter forwarded them to the branch office of the bank at San Francisco on June 14/27, 1906, with instructions to deliver the documents to the National Bank of Commerce of Seattle against payment of the amounts due to the Russo-Chinese Bank. Now, the documents are in my possession and I attach them herewith. Copy of documents attached as follows:

(A)  
CENTENNIAL MILL COMPANY  
MERCHANT MILLERS

Seattle and Spokane, Washington.

SEATTLE, Dec. 10, 1903.

SOLD TO Clarkson & Co.,

Port Arthur and/or Dalny

35,312/4 sax- 8,828 Bbls. "RUSSO-CHINESE" flour at \$4.10  
\$36/194.80

c.if

SHIPPED VIA S. S. "Hyades"

TERMS Draft 90 days thro' Russo-Chinese Bank.

(Stamped:)

Russo-Chinese Bank

No. 7055

Port Arthur.

(Copy)

(B)

Marks and Numbers

(In Duplicate)

No. 52459

\$40000.00

FIREMAN'S FUND INSURANCE COMPANY

of

SAN FRANCISCO.

Seattle, Wn., Dec. 11, 1903.

THIS CERTIFIES THAT Centennial Mill Company is insured under and subject to the conditions of open Policy No. 1457, Entry No. 4665 of the FIREMAN'S FUND INSURANCE COMPANY, in the sum of Forty Thousand and 00/100 Dollars on 35312 sks. "Russo-Chinese" flour, valued at sum insured on board the "Hyades" via ports and con. str. and/or stmrs. at and from Seattle, Wn., to Port Arthur and/or Dalny, loss if any payable in Hongkong to assured or order upon surrender of this Certificate properly endorsed and receipted.

J. B. LEVISON,

Marine Secretary.

Countersigned

BURNS, ATKINSON & CO.,

Agent.

(Stamped:)

Russo-Chinese Bank

No. 7035

Port Arthur.

Insured against all risk of particular average without limitation. Not valid unless countersigned by Burns, Atkinson & Co., Agents, Seattle, Wash.

In case of loss or damage to the interest insured under this policy, same shall be reported as soon as goods are landed or loss known to the Union Insurance Society of Canton, Limited, at Hongkong, Shanghai or Yokohama, and all claims shall be paid at the charter Bank of India, Australia and China, upon presentation of certificate of loss signed by said Society.

Endorsed on back:

CENTENNIAL MILL CO.

By R. C. HASSON, V. P.

(C)

In Duplicate.

Export Bill of Lading No. 369.

BOSTON STEAMSHIP COMPANY

(Stamped)

and

Russo-Chinese Bank

BOSTON TOW BOAT COMPANY.

No. 7035

Port Arthur.

Puget Sound-Oriental Line.

Agencies

Dodwell & Co., Ltd.,

Seattle, Wn. Tacoma, Wn.

General Agents at

Frank Waterhouse,

Yokohama and Kobe—Japan

Managing Agent.

Shanghai, Hankow,

Foochow,—China

Hong Kong

San Francisco,

Colombo—Ceylon

E. H. Forester, G. A. N. P. Ry.

RECEIVED from Centennial Mill Co. in apparent, good order and condition, except as noted, the following property (contents and condition of contents of packages unknown), marked, consigned and destined as indicated below for shipment at Seattle by steamship "Hyades" or any other steamship of the BOSTON STEAMSHIP COMPANY or BOSTON TOW-BOAT COMPANY:—

RATES OF FREIGHT.	MARKS AND NUMBERS.
G \$5.00 per 2000#.....G \$4325.72	RUSSO-CHINESE.

Payable at Seattle.....G \$4325.72

#### ARTICLES.

35312 Qr. Sax Flour	}	(Subject to correction).
1 Bundle (200) mty sax.		
Measurement ——— tons ——— feet		
Weight, lbs. 1,730,288		

To be carried by said steamer or any other steamer of the above company to the port of Port Arthur &/or Dalny (or so near thereto as she or they may safely get) with liberty to call at any port or ports in or out of the customary route (in any order), and to be there delivered unto Shipper's Order or to his or their assigns (Notify Clarkson & Co.) or to another carrier on the route to destination, if consigned beyond a regular port of call, upon payment of the freight thereon at the rate of \$5.00 per ton from Seattle to Port Arthur &/or Dalny payable as above in United States Gold Currency, with all other charges, advanced charges and average, without any allowance of credit or discount. Freight and advance charges payable at carrier's option in advance, in cash, or immediately on discharge of the property at the port of Port Arthur &/or Dalny in its equivalent in local currency at bank demand rate of exchange on New York.

In consideration of the rate of freight therein named, it is hereby stipulated that the service to be performed hereunder shall be subject to the conditions, whether printed or written, herein contained, and said conditions are hereby agreed to by the shipper and by him accepted for himself and his assigns as just and reasonable.

With respect to the service it is agreed that:

#### CONDITIONS:

-----  
 -----  
 IN WITNESS WHEREOF, the Agent signing on behalf of the said STEAMER, has affirmed to 2 Bills of Lading all of

even tenor and date, one of which Bills being accomplished, the others to stand void.

Dated at Seattle this 9th day of Dec., 1903.

FRANK WATERHOUSE,  
By W. D. Benson, Managing Agent.

Endorsed on back:

CENTENNIAL MILL CO.

By R. C. HASSON, V. P.

I had general supervision only of the draft for G\$36,194.80. Mr. Chernin, the chief of the department for collection of bills of exchange, and Mr. Alexander Drosdoff had charge of the draft. Mr. Chernin, now manager of the Russo-Chinese Bank at Chita, Siberia, presented the draft to Clarkson & Co. for acceptance immediately on receipt of it. The draft was accepted by Clarkson & Co. in writing at the office of the Russo-Chinese Bank at Port Arthur on the 17/30 January, 1904. Neither myself nor the Russo-Chinese Bank made any investigation at any time as to the quantity or quality of flour in the go-downs or warehouses of Clarkson & Co. at Port Arthur. Nor as the shipment of flour on the "Hyades." It was not the duty of the bank to look after goods in the go-downs of the steamship agent.

The bank at Port Arthur had a lot of documents in its portfolio for collection and dealt with the documents only unless otherwise instructed by the remitter. The National Bank of Commerce of Seattle remitted the draft for \$36,194.80 simply for collection. The bank at Port Arthur acknowledged the receipt of this draft by letter dated January 9/22, 1904.

I do not know how much flour Clarkson & Co. had in their go-downs at the commencement of hostilities between Russia and Japan.

According to the bill of lading the shipment of 35,312 sacks of flour on the "Hyades" was shipped by the Centennial Mill Co. as consignor to the port of Port Arthur or Dalny. The bill of lading was endorsed in blank by the Centennial Mill Co. Therefore the consignee is unknown. The bill of lading contained the following clause: "to be delivered there unto shipper's order or to his or their assigns (Notify Clarkson



& Co.) or to another carrier on the route to destination." The bill of lading was attached to the draft.

Neither the bank at Port Arthur nor myself ever obtained possession of the shipment of flour. Nor did the bank at Port Arthur take this flour into custody or control or sell it to the Russian Government or to one Ginsburg, a representative of the Russian Government. Nor did I or the Russo-Chinese Bank at Port Arthur surrender the draft or the documents attached thereto to the agent of the Steamship Co. These documents are in the possession of the Russo-Chinese Bank up to this date. The bank never got possession of the flour and never transferred it to Ginsburg. The bank never realized any sum from Ginsburg for this flour; never sold or delivered it to Ginsburg; nor do its books show any entries regarding such sale.

Cross-interrogatory 19. Do the books of the bank disclose the disposition of the funds from the sale of the flour to Ginsburg? If so, point out to the officer taking this deposition the entries showing such disposition. Make copies of said entries, giving the name of the book and the page upon which the entries occurred and have them translated into English. I want you to be particular and minute in answering this cross-interrogatory. Attach to your deposition all entries in all books of the bank touching the receipt and method of disposition of the 67,00 roubles realized from the sale of this flour.

Answer. I do not know and cannot know whether the 67,000 roubles cashed by Clarkson & Co. against the check drawn by Ginsburg were paid by the latter for the "Hyades" flour. I attach the following identified copies and translation of them of all entries regarding the payment of 67,000 roubles to Clarkson & Co. for account of M. Ginsburg & Co. on April 17/30, 1904, and the dispositions made by the latter on the same day.

(1) Copy of the check No. 1156 for 67,000 rs. issued by M. Ginsburg & Co., order bearer and endorsed by Clarkson & Co. (2) Copy of the cash voucher of April 17/30, 1904, for 8.489—roubles and 55 copecks received from Clarkson & Co. for account of the National Bank of Commerce of Seattle B/C No. 1412 (our No. 6386) for G\$4.136, with interest thereon.

(3) Copy of the cash voucher of April 17/30, 1904, for 33.053 roubles and 53 copecks received from Clarkson & Co. for account of the National Bank of Commerce B/C No. 1455 for G\$16.-155.20 with interest thereon. (4) Copy of the cash voucher of April 17/30, 1904, for 305 roubles and 80 copecks, being commission, postage, telegram expenses and stamps on the said drafts of the National Bank of Commerce of Seattle. (5) Copy of the cash voucher of April 17/30, 1904, for 25151 roubles 12 cop. received from Clarkson & Co. to the credit of their correspondent's account. (6) Copy of the cash-book, page 216 of April 17/30th, 1904, re. Rbls. 8.489,55 and Rs. 33.053,53, received from Clarkson & Co. (7) Extract of the cash-book page 217 of April 17/30th, 1904, re. Rbs. 25.151.12 received from Clarkson & Co. and Rs. 67.000, paid against M. Ginsburg & Co.'s check No. 1156. (8) Extract from the book "Journal," pages 311 and 312 of April 17/30, 1904, showing the entries re. transfer of \$20.981,35 equal to Rs. 41.543,08 to the National Bank of Commerce of Seattle. (9) Extract from the book "Correspondents their accounts," page 292, showing the movement of Clarkson & Co.'s account from April 12/25th, 1904, up to May 4/17, 1904, showing all the time a debit balance of their account, also payment of Rs. 25.151,12 to their credit on April 17/30, 1904.

Here follow documents identified by the witness as follows:

(Copy of the Check.)

Stamp: April 17 1904.

Number of account 5.

M. Ginsburg & Co.

RUSSO-CHINESE BANK.

Port Arthur, 16th April 1904.

Roubles 67000.—

(con.)

Russo-Chinese Bank.

Please pay to the bearer sixty seven thousand roubles and pass this amount to the debit of my special account.

PAID

Trading Firm

(Stamp)

M. GINSBURG & C.

By procuration L. Blankman.

No. 1156.

(On the back of the check:)

Trading Firm CLARKSON & CO.

By procuration N. Lerokuzoff.

(Copy of the cash voucher.)

17/IV, 1904.

Received from Messrs. Clarkson & Co.

Account Correspondents their account sundries according to letter of Nat. Bank of Commerce, Seattle, dated 6/X 03, Bill for collection \$1412 our number 6386, G\$4,136 plus 6% for 220 days G\$151.65=G\$4,287.65 at 198—Roubles 8,489.55 (eight thousand four hundred and eighty-nine roubles 55 cop.)

Cashier sign stamp: received.

G

(Copy of the cash voucher.)

Received from Messrs. Clarkson & Co.

17/IV, 1904

Account Correspondents their account sundries according to letter of Nat. Bank of Commerce Seattle, dated 26/X 03 Bill for Collection \$1455 our number 6500 G\$16,155.20 plus 6% for 200 days G\$538.50=G\$16,693.70 at the rate of 198  
-----Roubles 33.053.53

(thirty three thousand fifty three roubles & 53 copeck.)

Cashier sign Stamp: received.

G

(Copy of Cash voucher.)

Received from Clarkson & Co.

17/IV 1904

Account Sundries

on our numbers 6500 and 6386

our commission for collection.....Roubles 174.50

for telegram ..... 70.—

postage ..... 1.—

stamps ..... 60.30

Roubles 305.80

(three hundred and five roubles 80 copecks.)

Cashier sign G stamp received

(Copy of Cash voucher.)

5 476

Receive 291/II

## Account Correspondents

Clarkson & Co.

N 7 .....Roubles 25,151.12

Twenty five thousand one hundred and fifty one roubles and  
12 copecks.

Stamp received April 17th, 1904 .

The words "current account" not to be read.

As far as I know during the siege of Port Arthur the price of flour was a little higher than before the outbreak of the war, but there was a lot of flour in the go-downs of the Government and no scarcity was felt of it. I do not know the price of the flour.

There was no telegraphic communication possible with Port Arthur on April 28th/May 10th, 1904. No telegram was sent on that date from Port Arthur to Vladivostok in answer to a telegram from Vladivostok inquiring as to whether the drafts drawn by the Centennial Mill Co. upon Clarkson & Co. had been paid. And in no such telegram was it stated by the Port Arthur branch of the Vladivostok branch that all of the drafts of Clarkson & Co. had been paid. The bank at Port Arthur never telegraphed in substance that the draft for \$36,194.80 had been paid. The Russo-Chinese Bank at Port Arthur did not wire to the Russo-Chinese Bank at Shanghai to the effect that the draft for \$36,194.80 had been paid by Clarkson & Co. There was no telegraphic communication with Shanghai on or about May 10th, 1904.

The account of the firm of Clarkson & Co. with the Russo-Chinese Bank, Port Arthur branch, showed a debit balance from the first of December, 1903, up to December, 1904 (with the exception of June, 1904). Clarkson & Co. owed to the Russo-Chinese Bank at Port Arthur.

During December, 1903 (Russian style), about 51,000 roubles.

During January, 1904 (Russian style), about 49,000 roubles.

During February, 1904 (Russian style), about 40,000 roubles.

During March, 1904 (Russian style), about 41,000 roubles.

During April, 1904 (Russian style), about 35,000 roubles.

During May, 1904 (Russian style), about 20,000 roubles.

During June, 1904 (Russian style), about 30,000 roubles.

During July, 1904 (Russian style), about 36,000 roubles.

During August, 1904 (Russian style), about 37,000 roubles.

The following is a statement of Clarkson's account with the Port Arthur branch of the Russo-Chinese Bank on the dates mentioned.

December 1/14, 1903, Clarkson & Co. owed to the bank Rs. 55,363.72.

December 15/28, 1903, Clarkson & Co. owed to the bank Rs. 55,331.07.

January 1/14, 1904, Clarkson & Co. owed to the bank Rs. 50,003.12.

January 15/28, 1904, Clarkson & Co. owed to the bank Rs. 49,136.20.

February 1/14, 1904, Clarkson & Co. owed to the bank Rs. 48,451.65.

February 15/28, 1904, Clarkson & Co. owed to the bank Rs. 42,294.30.

March 1/14, 1904, Clarkson & Co. owed to the bank Rs. 40,995.90.

March 15/28, 1904, Clarkson & Co. owed to the bank Rs. 40,938.90.

April 1/14, 1904, Clarkson & Co. owed to the bank Rs. 40,923.90.

April 15/28, 1904, Clarkson & Co. owed to the bank Rs. 41,326.54.

May 1/14, 1904, Clarkson & Co. owed to the bank Rs. 41,544.65.

May 15/28, 1904, Clarkson & Co. owed to the bank Rs. 14,925.25.

June 1/14, 1904, Clarkson & Co. had a credit balance Rs. 5,146.45.

June 15/28, 1904, Clarkson & Co. had a credit balance Rs. 10,586.45.

July 1/14, 1904, Clarkson & Co. owed to the bank Rs. 33,568.65.

July 15/28, 1904, Clarkson & Co. owed to the bank Rs. 36,708.15.

August 1/14, 1904, Clarkson & Co. owed to the bank Rs. 36,708.15.

August 15/28, 1904, Clarkson & Co. owed to the bank Rs. 36,708.15.

On January 14, 1904, Clarkson & Co. had an overdraft account with the Port Arthur Branch of the Russo-Chinese Bank for 50,000 roubles. This amount had to be repaid by Clarkson & Co. by monthly installments of 3,000 roubles (or to reduce their indebtedness by 3,000 roubles monthly).

Cross-interrogatory 33. Attach to your deposition copies from the books of the bank, giving book and page where same occurs, the entries showing the various payments made by Clarkson & Co. to the Russo-Chinese Bank from December 1st, 1903, to August, 1904, and state from what sources the various sums paid by Clarkson & Company came.

Answer. I do not know from what sources Clarkson & Co. paid these sums. I attach extracts from the cash-book of the Port Arthur Branch of the Russo-Chinese Bank showing the payments made by Clarkson & Co. to the Russo-Chinese Bank from December, 1903, to August, 1904. Here follow extracts from the books.

I do not know from what sources Clarkson & Co. realized the sums which they paid into the bank or that they were realized from the sale of flour covered by documents attached to the various drafts drawn by the Centennial Mill Co. upon Clarkson & Co. in the hands of the bank for collection.

Relating to the draft for G\$16,155.20 drawn by the Centennial Mill Co. upon Clarkson & Co. covering a shipment of flour on the steamer "Tremont" consisting of 1,000 sacks of "Blue Stem" flour and 14,688 sacks of "Russo-Chinese" flour, due about March 8, 1904, this was a draft drawn with documents attached and was accepted by Clarkson & Co. December 8/21, 1903, and became due March 8/21, 1904. It was paid April 17/30, 1904, and was remitted to the National Bank of Commerce with another sum of \$4136 by telegraph on



Ladenburg, Thalmann & Co., New York. This draft could not be protested for nonpayment at maturity because of the absence of the notary from Port Arthur.

I do not know when the flour securing the said draft reached Port Arthur or to whom it was sold. There are no entries in the books of the bank relating to the sale of the merchandise securing that draft. The bank did not sell the merchandise. The proceeds of that flour were not received by the Russo-Chinese Bank or applied by the bank to the reduction of the indebtedness of Clarkson & Co. to it.

Clarkson & Co.'s indebtedness to the bank was an overdraft account with the bank secured by promissory notes. The notes were in the ordinary form, signed by Clarkson & Co. I cannot attach copy of them as they are not in my possession. I do not know from what source Clarkson & Co. realized the money with which they made payments on their indebtedness.

The Russo-Chinese Bank at Port Arthur did not use the proceeds of flour securing the draft for G\$16,155.20 or the proceeds of the sale of flour securing another draft for \$4,136 made by the Centennial Mill Co. in favor of the National Bank of Commerce upon Clarkson & Co. toward the reduction of the indebtedness of Clarkson & Co. to the bank.

The Russo-Chinese Bank did not in the early part of 1904 realize that Clarkson & Co. was insolvent; nor did it appropriate to its own use the proceeds of flour securing the drafts that it had for collection for the National Bank of Commerce; nor did it appropriate such proceeds against the reduction of the indebtedness of Clarkson & Co. to it.

The bills of lading attached to the draft for \$36,194.80 was issued by the Boston Steamship Co. and the Boston Towboat Co. of Seattle. I do not know who issued the other bills of lading. The agents of the S. S. "Hyades" in 1904 were Clarkson & Co. I do not know who were the agents of the other steamship company.

About April 15/28, 1904, the Russo-Chinese Bank ascertained that Clarkson & Co. were the agents of the steamship company operating the "Hyades." This was ascertained at the request of H. F. Ostrander of the Centennial Mill Co.

communicated through the Russo-Chinese Bank at Shanghai to the bank at Port Arthur.

The fact was the bank at Port Arthur replied immediately by wire that Clarkson & Co. were in possession of the goods and that the goods had been sold by them.

When the bank had knowledge that Clarkson & Co. had possession of the flour, the bank informed H. F. Ostrander of the Centennial Mill Co. of Seattle and the National Bank of Commerce of Seattle of that fact.

On the 5th of August, 1904, the bank at Shanghai sent to the National Bank of Commerce of Seattle a letter containing copies of correspondence on the subject of the drafts and the branch bank at Shanghai and Ostrander with the Centennial Mill Co.

As near as I can recollect the first draft drawn by the Centennial Mill Co. upon Clarkson & Co. sent to the Russo-Chinese Bank at Port Arthur by the National Bank of Commerce was one for G\$52,925, which was received at Port Arthur in April, 1902.

It is not true that from that time forth the bank at Port Arthur had knowledge that Clarkson & Co. were the agents of the steamship company.

The instruction of the National Bank of Commerce to the Russo-Chinese Bank was to the effect that the drafts drawn on Clarkson & Co. were to be accepted by Clarkson & Co., and that the bank at Port Arthur was to hold the documents, bills of lading, etc., securing the drafts and not to deliver them to Clarkson & Co. until the drafts were paid.

At the request of Mr. Ostrander of the Centennial Mill Co. the bank made inquiries in April, 1904, regarding the flour covered by documents then in possession of the bank.

The bank's connection with these transactions was limited to the documents relating to the drafts and it had no reason without being specially instructed to interest itself with the merchandise covered by the documents received for collection.

It did not permit Clarkson & Co. to take possession of the flour. If they took possession of it, they did it on their own responsibility. It was not the bank's business to look after the merchandise. And I did not know the manner or

method in which Clarkson was transacting his business with reference to these drafts. Neither did I know that Clarkson got possession of the flour.

In the bill of lading attached to the draft for \$36,194.80 the Centennial Mill Co. was the consignor; the consignee was unknown. The bill of lading was endorsed by the Centennial Mill Co. in blank and there were no other endorsements.

The bank did not have the legal right to take into its custody or control the flour covered by such bills of lading without being instructed thereto by the National Bank of Commerce of Seattle. It was not the bank's business to look after the merchandise covered by the bills of lading. The steamship company is responsible for the cargo.

In December, 1903, the Russo-Chinese Bank at Port Arthur extended to Clarkson & Co. a credit up to 50,000 roubles for their business in Port Arthur. This credit had to be repaid by bills of exchange drawn by Clarkson & Co. at Port Arthur on Clarkson & Co., Vladivostok, whereof 2,000 roubles on January 15/28, 1904, and afterwards by monthly payments of 3,000 roubles on 15/28 of each month.

The bank paid the same attention to the documents held as security for the drafts drawn on Clarkson & Co. as to other documents drawn on other firms at Port Arthur.

The credit was extended to the entire business of Clarkson & Co. and not for payments of the drafts drawn upon them.

Clarkson & Co. had no right to overdraw their account above the amount of the credit granted and had no arrangement with the bank by which they were permitted to take possession of the flour covered by the documents in possession of the Russo-Chinese Bank.

I do not know what became of the flour securing the two drafts for \$4,136 and \$16,155.20. The draft for \$4,136 matured February 27/March 11, 1904. At the maturity of that draft Clarkson & Co. did not pay any money to the bank. The draft for \$16,155.20 matured March 8/21, 1904. Clarkson & Co. made no payments on that date or at any time from February 26/March 10 up to April 1/14, 1904.

The bank has a record that on April 13/26, 1904, it noti-

fied the National Bank of Commerce of the nonpayment of drafts for \$4,136 and \$16,155.20. The notification was given by letter of which copy is attached herewith as follows:

"7640

13/26 April 4 55.

THE NATIONAL BANK OF COMMERCE.

Seattle, Wash.

Your D/B No. 1412/6386 G\$ 4136.—due 27/11-111-1904

(D/P) on Clarkson & Co.

No. 1455/6500 G\$ 16155.20 due 8/21-111-1904 D/P) P/Arthur

Dear Sirs.—We return you herewith enclosed the above two bills (also second) which have been refused payment and request you to kindly acknowledge receipt. It was impossible for us to have them protested on account of the absence of the notary public, as it appears from the enclosed declaration of the P/Arthur Municipality, two copies of which please find enclosed, one for each bill.

Please remit for our a/c to Messrs. Ladenburg Thalmann & Co., New York, under advice to us

G\$76.09 3/8 % Comm.

10.14 1/2 o/oo return comm.

30.27 billstamps

1.—postage

---

G\$117.50 in all & oblige.

on both bills

Yours faithfully,

RUSSO-CHINESE BANK.

(Port Arthur Branch.)

p. p. A. OVSIANKIN.

p. p. A. FRIEDBERG.

Enclosed:—

2 bills & seconds

2 declarations

The drafts for \$4,136 and \$16,155.20 could not be protested for the reason that the Notary of Port Arthur was absent at the time of their maturity.

The draft for \$36,194.80 was protested April 20/May 3, 1904, and returned with the deed of protest to the National

Bank of Commerce of Seattle with the letter dated May 13/26, 1904.

The draft for \$36,194.80 with the deed of protest was received back from the Notary at Port Arthur at the time when communication was cut off both at sea and on land. Under such circumstances the mail could not be forwarded from Port Arthur, and therefore the bank kept the draft with the deed of protest in the safe until communication should be re-established.

The proceeds of the drafts for \$4,136 and \$16,155.20 were remitted by the bank at Port Arthur by telegraphic transfer to the National Bank of Commerce at Seattle through the head office of the bank at St. Petersburg, on Ladenburg, Thalmann & Co. at New York on April 17/30, 1904.

The Russo-Chinese Bank did not prior to the sale of flour to Ginsburg advance to Clarkson & Co. the money with which the drafts for \$4,136 and \$16,155.20 were paid. Nor did the bank out of the proceeds of the sale of the flour shipped on the "Hyades" reimburse itself for the money thus advanced.

I know the date on which the Japanese Government returned to the Russo-Chinese Bank the papers and effects of the bank captured at the time Port Arthur fell, because as soon as I received the permission of the Japanese Government I went to Port Arthur in February, 1906, in order to take the necessary steps before the Japanese authorities there for the recovery of the books, papers and effects of the bank, and received them back in March, 1906.

I know that all of the books, papers and effects in the possession of the Japanese military forces belonging to the bank were returned to it, because having been for over two years and also during the siege of Port Arthur in charge of the banks' business I knew what books, papers and effects were kept by the bank before they were seized by the Japanese military forces and know that I received them back.

I am not a lawyer by profession.

I know what official appointment A. Belinsky held. He had a notary's office at Port Arthur and all documents attested before him were recognized by the Court as well as official authorities. I never saw his official appointment.



And thereupon counsel for the plaintiff read in evidence the letter being the letter of the National Bank of Commerce of Seattle transmitting the draft herein in question to the

Russo-Chinese Bank at Port Arthur:

H. C. Henry, President.

R. R. Spencer, Cashier.

O. A. Spencer, Ass't. Cashier.

THE NATIONAL BANK OF COMMERCE.

Codes:

A. B. C. & A. 1.

Lieber's.

Bedford McNeill.

Cable Address: "Commerce."

Seattle, Wash., Dec. 11, 1903.

The Manager Russo-Chinese Bank, Port Arthur, China.

Dear Sir: Enclosed I hand you for collection and returns in New York funds 90 d/s drafts as follows:

Clarkson & Co. G \$ 1.100.00.

" " " G \$ 36.194.80.

Documents are to be delivered on payment.

Very truly yours,

R. R. SPENCER.

Counsel for plaintiff then introduced in evidence "Plaintiff's Trial Exhibit 1," as viz., the preceding.

Plaintiff offered in evidence the book extract produced by the witness in connection with Interrogatory 33 and his answer thereto which were as follows:

Interrogatory 33. If you have before you the books of the Russo-Chinese Bank at Port Arthur, covering the time of 1904 and 1905, and containing entries referring to the transaction of the draft of the Centennial Mill Company upon Clarkson & Company for \$36,194.80, about which you have already been interrogated, please exhibit to the officer taking your deposition, the entries in such books referring to said draft, and have a copy of such entries in the Russian language, together with a translation thereof into English attached to your deposition.



Answer.—Yes, I have before me the books of the Russo-Chinese Bank at Port Arthur, covering the time of 1904 and 1905. I beg to attach an identified copy of the entry of the draft of the Centennial Mill Co. upon Clarkson & Co. for \$36,194.80 and an identified translation thereof into English, which you have compared with the original book I have exhibited to you.

The witness had also testified in response to cross-interrogatory 3, which was as follows:

Cross-interrogatory 3. State what particular books were kept with reference to the drafts drawn by the Centennial Mill Company upon Clarkson & Company and sent to the Russo-Chinese Bank by the National Bank of Commerce of Seattle for collection. Describe in detail the manner in which your books were kept with regard to entries relating to these drafts.

Answer.—The bank at Port Arthur kept a special book for all bills of exchange received for collection with documents or without them. As soon as a bill of exchange was received, it was entered in the general book "Bills of Exchange for collection." In the general book "Bills of Exchange for collection" was noticed the date of receipt, the current number of the bill in numerical order, the number given by the remitter or indicated on the respective bill, the date of the letter of the remitter relating to the bill, the name or the firm of the remitter, the town of the remitter, the kind of documents relating to the bill, the drawer of the bill, the town of the drawer, the date of issue of the bill, the drawee, if a sight draft a notice of the term was made, the date of maturity, the instructions of the remitter, the amount of the draft and the date of payment or return of the draft. If a sight draft was accepted by the drawee, the date of maturity was noticed in the book "Bills of Exchange for Collection."

The said book extract was as follows:

EXTRACT FROM THE BOOK, BILLS FOR COLLECTION  
OF THE PORT ARTHUR BRANCH OF THE  
RUSSO-CHINESE BANK, PAGE 27,  
OF THE YEAR 1904.

Date of Re-	Our	Their	Date of the Letter	From whom
1904	ceipt.	No.	No.	with which received.
January 10	7035	1559	11/XII '03	Nat. Bank of Com.

Town	Kind of Docu-	Order	Town	Date of the Drawee.
	ments.			Draft.
Seattle	1 draft	Centennial	Seattle	11/XII '03
	1 invoice	Mill Co.		Clarkson & Co.
	1 bill of lading			
	1 insurance Policy.			

Maturity	Instructions of the	Roubles	Francs	Mexican	Yen
	Remitter.			Dollars	Tael.
90 d. 17/IV '04	post rem.	_____	_____	_____	_____
Gold Dollars	Pound German	Foreign value in	Date of Observa-		
	Sterlin	Marc	Roubles.	Payment	tions.
36,194.80	_____	_____	72,389.60	_____	Draft re-
					turned 13/V-'04
					Documents returned
					14/27/VI '06 to San
					Francisco.

Plaintiff also introduced in evidence the documents attached to the deposition of the witness Friedberg in answer to cross-interrogatories, as follows:

1. Invoice. (See ante, page—.)
2. Fire Insurance Policy with endorsement thereon. (See ante, page —.)
3. Bill of lading in duplicate with endorsement thereon. (See ante, page —.)
4. Copy of check, April 17th, 1904, for 67,000 roubles. (See ante, page —.)
5. Copy of cash voucher April 17/30th, 1904, from Clarkson & Co. (See ante, page —.)

6. Copy of cash vouchers 330 53, 53 cop. from Clarkson & Co. (See ante, page —.)

7. Copy of cash voucher dated 17/IV, 1904, from Clarkson & Co. (See ante, page —.)

8. Copy of cash voucher, Clarkson & Co. 25,151.12 roubles. (See ante, page —.)

9. A letter addressed by Russo-Chinese Bank at Port Arthur to the National Bank of Commerce, Seattle, Washington, dated 13/26 April, 1904. (See ante, page —.)

Thereupon the plaintiff read in evidence the deposition of Alexander Drozdov, taken and certified before the Honorable James W. Ragsdale, United States Consul at St. Petersburg, Russia, and certified by him in his official capacity.

My name is Alexander Drozdov, thirty-four years old, residing at St. Petersburg. I am an officer of the Russo-Chinese Bank.

I resided between January 1st and December 31st, 1904, at Port Arthur. I was in the service of the Port Arthur Branch of the Russo-Chinese Bank, and was also employed as book-keeper in the Household-Economic Company of officers and military officials of the Quantoon region.

In my capacity as clerk of the Russo-Chinese Bank, I was keeping the books of the bills of exchange section. I kept the register of documents received and sent to be cashed, and from March 2/15, 1904, I kept also the register of bills of exchange received and sent to be cashed; wrote to the parties notices in regard to receipt of documents and bills to be accepted and paid. Wrote also to the Notary in regard to his presenting bills for acceptance and payment or protesting them in case of non-acceptance and refusal of payment, and sent such letters off.

After the departure of many of the staff of the office, viz., 17-19 July, 1904, I kept not only these books but did everything which was requisite by the course of the bank's affairs, which by this time was very much reduced owing to the siege of Port Arthur; thus for instance from the date mentioned, I also kept book of correspondents and the current accounts and filled out cash orders for the receipt and disbursement of various sums of money.

Interrogatory 6. State whether or not the bank kept books of account of its transactions and particularly its transactions involving the collection of drafts forwarded to it by other banks for collection.

Answer. Yes, books were kept absolutely on all operations of the bank and also on bills received by the bank to be cashed.

Interrogatory 7. Were its books involving such transactions kept correctly?

Answer. Yes, the books were kept according to rules.

The bank had transactions involving the collection of drafts sent to it for collection by the National Bank of Commerce, Seattle, Washington, in the year 1904, and among which were drafts on the trading firm of Clarkson & Co. In January, 1904, the bank received from the National Bank of Commerce a draft for the sum of G\$36,194.80 on the firm of Clarkson & Co., drawn by the Centennial Mill Co. and payable at 90 days after sight. The last-named draft was received by the bank at Port Arthur on January 9/22, 1904. The draft was presented for acceptance on January 10/23, 1904. I know from the books of the bank that this draft was accepted by Clarkson & Co. on January 17/30, 1904. Also that the bank by letter dated January 17/30, 1904, No. 1903, informed the National Bank of Commerce of the acceptance of the draft by Clarkson & Co.

This draft was accompanied by the following documents and bill for 35,312 sacks of flour; the original and duplicate of the certificate of an insurance policy, and the original and duplicate of a bill of lading of the S. S. "Hyades" the bank kept these documents in the safe-room until the firm of Clarkson & Co. should pay the draft for \$36,194.80.

At the maturity of the draft it was not paid by Clarkson & Co. either in full or in part. As the draft was not paid at maturity I sent it by order of the managers of the bank to the Port Arthur Notary, Belinsky, directing him to present it to Clarkson & Co. for payment and in case of non-payment to protest the documents.

In April and May, 1904, the war operations which began between Russia and Japan in January, 1904, still continued.

Port Arthur was declared to be in a state of siege. From January 27th, 1904 (old style), Port Arthur was blockaded from the sea and the Japanese periodically bombarded the town also from the sea side. By land Port Arthur was cut off after April 21, 1904 (old style). And in this manner the communication with Port Arthur was cut off after that time.

Clarkson & Co. was engaged as agents and commissioners under their own risk and responsibility and were representatives of several firms and agents for several steamship companies. I do not know what connection there was in 1903 and 4 between Clarkson & Co. and the Boston Steamship Co. and the Boston Towboat Co., or either of them.

In April, 1904, upon receipt of an inquiry from our branch in Shanghai I learned that Clarkson & Co. were the agents of the Boston Steamship Co.

Interrogatory 23. State all that you know about the flour shipped per S. S. "Hyades" to Clarkson & Co. against which the draft for \$36,194.80 was drawn.

Answer. Judging by bills of lading and information gathered, Clarkson & Co. ought to have received the flour which arrived on S. S. "Hyades" and which was to come into their possession only upon payment of the draft for \$36,194.80.

Upon the capitulation of Port Arthur all books, papers and documents belonging to the bank at Port Arthur were confiscated by the Japanese. These books, papers and documents were in the possession of the Japanese from December 22 (old style), 1904, to March, 1906. They were received back from the Japanese in March, 1906, by Alexander Friedberg, holding a power of attorney from the Russo-Chinese Bank.

While the books, papers and effects were in the possession of the Japanese the bank had no access to them.

They are now in the possession of the Board of the Russo-Chinese Bank at St. Petersburg.

The difference between the Russian and American calendars in thirteen days. April 17, old style adopted by the Russians, answers to April 30, adopted by the United States and England.

In 1903 and 1904, the laws of the Russian Empire were in force in Port Arthur.

In 1904 a law was in force in Port Arthur by virtue whereof two days' grace was allowed after date of maturity, besides Sundays and holidays.

Interrogatory 33. If you have before you the books of the Russo-Chinese Bank at Port Arthur covering the time of 1904 and 1905, and containing entries referring to the transaction of the draft of the Centennial Mill Co. upon Clarkson & Co. for \$36,194.80 about which you have already been interrogated, please exhibit to the officer taking your deposition the entries in such books referring to said draft and have a copy of such entries in the Russian language together with a translation thereof into English attached to your deposition.

I identify and append hereto a copy of a letter from the National Bank of Commerce in which the documents for G\$36,194.80 were received. This letter was received in the bank on January 9, 1904, through the Russian postoffice in Port Arthur. (See ante, page 34.)

I produce here copy-books of the bank at Port Arthur containing copies of letters and telegrams addressed and forwarded by said bank to the National Bank of Commerce of Seattle, and copy herewith letters as follows:

(a) The letter of the Bank at Port Arthur to the Port Arthur Notary A. Belinsky, dated 19/IV, 1904, old style, with the request to present the draft for \$36,194.80 for payment and to protest it in case of non-payment.

Extract from the book "Copying-book No. 16 Local biz from April 6 to July 15, 1904." Russo-Chinese Bank Port-Arthur Branch, page 116.

No. 7889.

Port Arthur. April 19, 1904.

To the Notary Public of the town of Port-Arthur, City.

Sir: By the present we beg you to present for payment and, in case of refusal, to protest the enclosed bills, viz.:



Order No.	Bill No.	Name of drawer.	Name of drawee.	Terms of bill.	Amount. rs.
1	11364	Russo-Chinese Bank	A. Mihailovsky.	19/IV	300.
2.	7646	J. Kayalov	Tun-Sun-Sian & Co.	—	587.82
3	5908	Geo. Borman Co.	Zazounov.	18/IV.	863.57
4	7035	Centennial Mill Co.	Clarkson & Co.	17/IV	71.665.70

Note.—At the day's rate of exchange 198. G.\$36194.80.

Respectfully yours,

RUSO-CHINESE BANK.

p. p. A. FRIEDBERG,

p. p. A. OVSIANKIN.

(b) Letter of the Bank at Port Arthur to the National Bank of Commerce of Seattle, May 13/26, 1904, with which the draft for \$36,194.80 was returned with the act of protest for non-payment of the same.

13/26 May 4.

674

## NATIONAL BANK OF COMMERCE

Seattle, Wash.

Your rem'ce for coll. 11/XII-03 No. 1559/7035 G\$36194.80  
pr 17/IV-1904 D/P

Dear Sirs,

This had to be protested for non-payment and is herewith returned together with its deed of protest. Kindly acknowledge receipt & remit on our account to the First National Bank of your city.

Rbs. 566.25 sundry ch'ges as per following description, thus obliging.

Rbs. 271.50  $\frac{3}{8}\%$  comm.

" 184.25 protest

" 2.— carriage fare

" —.50 postage

" 108.— billstamp

---

Rbs. 566.25

---

The reason of dishonor is that the goods have not been landed here. The shipping docs are being kept here pending receipt of your instructions.

Yours faithfully

RUSSO-CHINESE BANK.

(Port Arthur Branch)

A. D. MAMONOFF

p. p. A. FRIEDBERG.

Enclosed:—

one bill (first)

one bill (second)

one deed of protest.

I knew A. Belinsky personally. He was Notary Public of Port Arthur.

With reference to the payment into the Russo-Chinese Bank at Port Arthur for account of Clarkson & Co. of the sum of 67,000 roubles on or about April 30th, 1904, I know that on the 17/30/IV/1904, the representative of Clarkson & Co. presented for payment a check drawn by the trading firm Ginsburg & Co. No. 1156, for Rbl. 67.000.—, which was paid by the bank in Port Arthur; which is shown by the documents of the cash section of the bank and by the books of the bank for the year 1904, fol. 216 and 217.

As shown by the cash-book of the Bank, the representative of Clarkson & Co. made on the same day the following payments:

I. Rbl. 8489.55c. for payment of the draft of the National Bank of Commerce of Seattle, amount: G\$4136—6% for 220 days G\$151.65=4287.65 at the rate of exchange of Rbl. 198.—

II. Rbl. 33053.53. for payment of the draft of the National Bank of Commerce of Seattle, amount: G\$16155.20—6% for 200 days G\$538.50=G\$16693.70, at the rate of exchange of Rbl. 198.—

III. Rbl. 174.50.—the commission of the bank on the above drafts.

IV. Rbl. 70.—telegraph expenses for the transfer of said drafts.

V. Rbl. 60.30.—stamp duty on same.

VI. Rbl. 1.00—postage on same.

VII. Rbl. 25151.12 were deposited on account No. 7 of correspondents "Loro" of the firm Clarkson & Co.

At that time the value in G\$67,000 roubles was \$33,838.38.

Besides the draft of G\$36.194.80.— in the portfolio of the Port Arthur Bank, towards 17/30 April, 1904, were the following drafts, drawn by the Centennial Mill on Clarkson & Co. and received for collection from the National Bank of Commerce of Seattle.

I. Draft with enclosure of 1 bill of lading, 1 invoice and 1 insurance policy, 90 days' sight, amount G\$4136.— received in letter, date 6/X. The Bank acknowledged receipt of these documents in letter date 8/21/XI/1903. Clarkson & Co. accepted this draft on 27/10/XII/1903, term 27/11/1904 old style, and information thereof was sent to the National Bank of Commerce of Seattle on the same day.

II. Draft with enclosure of 1 bill of lading, 1 insurance policy and 2 certificates, 90 days' sight, amount G\$16,155.20 received with letter, dated 26/X/1903.

The bank acknowledged receipt of these documents in letter dated 19/2/XII/1903. Clarkson & Co. accepted this draft on 8/21/XII/1903, term 8/21/III/1904 and information thereof was sent to the National Bank of Commerce of Seattle on the same day.

Though both these drafts were not paid at maturity, the bank was deprived of the possibility of executing protest for non-payment by reason of the notary having left Port Arthur.

Enclosed in the letter of the bank in Port Arthur, dated 13/26/IV/1904, these drafts were returned to the National Bank of Commerce of Seattle, and the belonging documents were kept in the bank pending receipt of further instructions.

Clarkson & Co. having paid these drafts on 17/30/IV 1904, the documents belonging to same were delivered to said firm and information was sent on the same day to the National Bank of Commerce, of Seattle. G.\$151.65.—accrued on draft of G.\$4136.— for 220 days at the rate of 6%, and G.\$538.50 on the draft of G\$16,155.20 for 200 days at 6%. The amounts paid on the drafts and the interests were transferred by telegraphic order, to the National Bank of Commerce, of Seattle,

through the board of the bank in St. Petersburg, in a bulk sum of G\$20,981.35.

III. Draft with enclosure of 1 bill of lading and 1 insurance policy, 90 days' sight, amount G\$23,468.40.— was received with letter dated 2/I/1904. The bank acknowledged reception of these documents in a letter, dated 6/19/II/1904, and warned that it waives all responsibility as regards non-protest and non-payment owing to the state of siege being declared at Port Arthur.

The draft not being accepted, protest was made on 23/V/1904 and draft and protest sent by mail to the National Bank of Commerce of Seattle in letter, dated 7/20/VI/1904. The documents, belonging to this draft, were sent to the Russo-Chinese Bank at San Francisco, on 14/27/VI/1906, with instruction to remit them to the National Bank of Commerce of Seattle only on payment by the same of the expenses of the protest of the draft and of the amounts with interest accrued on the unpaid drafts of G\$36,194.80 and G\$270.

I do not know out of what funds Clarkson & Co. paid the drafts above mentioned for \$4136 and \$16,155.20, but I presume that they were paid out of the 67,000 roubles received by Clarkson & Co. on a check of Ginsburg & Co.

In April and May, 1904, the Bills of Exchange Statute, Edition of 1903, "General for the Whole Russian Empire," was in force.

#### Cross-examination.

I practically kept all the books of the Russo-Chinese Bank at Port Arthur from January 1st, 1904, to Dec. 23d, the same year.

Drafts drawn by the Centennial Mill Company upon Clarkson & Co. and sent to the Russo-Chinese Bank by the National Bank of Commerce of Seattle for collection, as well as all other drafts received were entered into the book called "Bills of Exchange received for Collection" in the following order.

1. Date of receipt of draft.
2. Number of entry.
3. Number under which the draft has been dispatched.
4. Date of letter accompanying the draft.
5. From whom received.

6. City wherefrom the draft has been dispatched.
7. To whose order the draft was drawn.
8. City on which the draft is drawn.
9. Date of draft.
10. Payee.
11. Terms of draft.
12. The remittents instruction.
13. Draft's amount.
14. Draft's amount in roubles.
15. Column where the date of payment of the draft or its transfer to another town was entered.

To drafts drawn by the Centennial Mill Co. in favor of the National Bank of Commerce and upon Clarkson & Co. documents were attached consisting of bills of lading, bill, insurance policy or certificate of naval insurance. Such documents were attached to the draft for \$36,194.80 as I have already stated in my answers to direct interrogatories.

M. Chernin, according to the order established in the Bank, immediately submitted this draft to Clarkson & Co. for acceptance. But they did not accept it immediately and did so on 17/30, January, 1904. The draft was accepted in the bank's office in writing.

I do not know when the flour on the "Hyades" arrived. I am almost sure, however, that the "Hyades" arrived before 17/30 January, the day of the draft's acceptance.

Nobody except Clarkson & Co. knew or could know the quantity of flour stored in their warehouses on the day when military operations began between Russia and Japan.

The bill of lading with all the rest of the documents were to be delivered to Clarkson & Co. only upon the payment of the draft for \$36,194.80. Neither I, nor the bank in Port Arthur made use of them, because we did not receive any flour at all.

The bank did not receive the flour for storage and did not sell such flour either to the Russian Government or Ginsburg or anybody else.

The documents attached to the draft were not surrendered to the agents of the steamship Co. They were kept by the bank during the whole time and are in the bank until now.

The bank never received any money from Ginsburg for the flour and never sold him such flour. Nor did it deliver flour to Ginsburg. The bank's books show no entries concerning the sale of flour to Ginsburg.

Regarding the receipt of 67,000 roubles from Clarkson & Co. on a check of Ginsburg, I don't know whether this was really paid for the cargo of flour on the steamer "Hyades." I have already attached to my deposition (see ante, page 21/22/23) the book entries and check and cash orders concerning that matter.

As to the price of flour during the siege of Port Arthur, all I know is that it was somewhat higher than before the war. But in the Government warehouses there were large stores so there was no lack of it. The price of flour is unknown to me.

The Russo-Chinese Bank did not control Clarkson & Co.'s storehouses. I personally have not once been either in Clarkson & Co.'s office nor in their storehouse.

Several days after the first bombardment of Port Arthur by the Japanese, (i. e. February 27, 1904) Messrs. Davidson, manager of the firm, and Chekovich, assistant manager, left Port Arthur. The Bank obtained information that Davidson entered into an illegal agreement with Ginsburg & Co. for the sale to the latter of a cargo of flour belonging to Clarkson & Co. At this time the Court had already left Port Arthur. In compliance with Clarkson & Co.'s request at Vladivostok the bank concurred in the annulment of the business made by Davidson, but never took upon itself the management of the firm's affairs. After Davidson left a certain Newhard was appointed manager of the firm of Clarkson & Co. in Port Arthur. The latter had to leave Port Arthur in February and then Serokoozov took his place as representative of Clarkson & Co. and settled the matter with Ginsburg & Co. according to instructions received from Clarkson & Co.

Cross-interrogatory 23. Could not the bank by the exercise of ordinary business prudence have realized for the flour sold to Ginsburg at least 100,000 roubles in the open market?

Answer: As I have already answered the Port Arthur Branch had no participation whatever in the sale of flour.

In May, 1904, the bank's correspondence in foreign lan-



guages was entrusted to Ezio Sandri, at present employed in the service of the Shanghai branch of the bank.

I do not recall that the Russo-Chinese Bank at Vladivostok telegraphed to the bank at Port Arthur on the 10th of May, 1904, inquiring as to whether the drafts drawn by the Centennial Mill Co. upon Clarkson & Co. had been paid. Telegraphic communication with Port Arthur was cut off on that date. No such telegram was ever sent. Nor did the Port Arthur branch wire that the draft for \$36,194.80 was paid or anything to that effect.

The account of the firm of Clarkson & Co. with the Port Arthur Branch from December, 1903 to December, 1904, (except for the month of June, 1904) showed a continual debit balance.

Witness produces statement showing monthly balances as stated by the witness Friedberg. (See ante, page —.)

I do not know from what sources Clarkson & Co. made payments of money into the bank.

The Port Arthur Branch received from the National Bank of Commerce of Seattle in a letter of October 26, 1903, a draft with documents, for \$16,155.20 at 90 days' sight, drawn by the Centennial Mill Co. on Clarkson & Co. with 6% per annum interest accrued since the date of the draft until date of receipt in Seattle of the amount thereof. The bank acknowledged the receipt of the draft by letter of December 19/ January 2, 1903. Clarkson & Co. accepted the draft and payment was due on March 8/21/1904. But it was effected only on April 17/30/1904. On the same day the principal of the draft with accrued interest for 200 days at the rate of 6%, \$538.50 as well as the sum due on another draft was transferred in a lump sum of \$20,981.35 by telegraph through the Bank's Board on Landenburg, Thalmann & Co. New York. This draft was not protested at maturity, *owing the* absence of the Notary from Port Arthur at that time.

I do not know when the cargo securing the draft for \$16,155.20 was received in Port Arthur or to whom it was sold; and there are no entries in the bank's books regarding the sale of such cargo. The bank did not sell it. The proceeds of such cargo or flour were not received by the Russo-Chinese

Bank or applied by the bank toward the reduction of indebtedness of Clarkson & Co. to it.

The indebtedness of Clarkson & Co. to the bank was secured by promissory notes, which were drawn and signed by the firm in due form. I have no copy of any of these notes.

The documents accompanying these drafts were in the possession of the bank. Those securing the drafts for \$16,155.20 and \$4136 were delivered to Clarkson & Co. upon payment of the amounts due thereon on April 17/30, 1904.

Clarkson & Co. never applied to the bank in Port Arthur requesting that they be allowed to sell or dispose of the goods securing the above drafts.

When they paid in money the bank had to follow their instructions and without having the same it could not carry over the items of Clarkson & Co.'s accounts. Neither could the Bank give Clarkson & Co. directions as to the manner of disposing of their moneys.

The bank did not in the early part of the year 1904 realize that Clarkson was insolvent nor did it appropriate to its own use the proceeds of flour securing the drafts it had for collection for the National Bank of Commerce. Nor did it appropriate such proceeds toward the reduction of the indebtedness of Clarkson & Co. to it.

I do not know who were the agents at Port Arthur of the steamship companies issuing the bills of lading above referred to.

During the year 1903-04 Clarkson & Co. were the agents of the "Hyades" which arrived in January, 1904. The bank first ascertained that Clarkson & Co. were the agents of the steamship company at Port Arthur April 15/28, 1904, when H. F. Ostrander of the Centennial Mill Co. requested the Shanghai branch of the bank to wire Port Arthur asking the bank there to investigate whether Clarkson & Co. had sold without payment the cargo securing the drafts drawn by the Centennial Co. This investigation proved that Clarkson & Co. were agents of the steamship company; and that they had unloaded the cargo on its arrival in Port Arthur. The Port Arthur branch wired immediately that the goods had been received by Clarkson & Co. and that they had sold the same.

The National Bank of Commerce was notified of the situation in regard to these drafts by correspondence between it and the Shanghai branch of the bank in August, 1904, which correspondence is as follows:

LETTER OF THE RUSSO-CHINESE BANK IN SHANGHAI  
DATED 5/VIII/04 TO THE NATIONAL BANK OF  
SEATTLE:

RUSSO-CHINESE BANK.

Per S. S. "Empress of China."

Shanghai, 5th August, 1904.

No. 9/2.

The National Bank of Commerce, SEATTLE.

Dear Sirs: Confirming our respects of 6th ultimo, we beg to refer to your following remittances all drawn on Messrs. Clarkson & Co. Port-Arthur, and sent by you direct to our Branch at that port for collection:

Your No.	1412	for	G\$	4136.00
"	"	1455	"	G\$16155.20
"	"	1559	"	G\$36194.80
"	"	1690	"	G\$23468.40

We beg to hand you herewith:

1. Copy of our telegram of 22d April to our Port-Arthur Branch.

2. Copy of the cable reply dated 23d April (received here on 1st May) sent by our Port Arthur Branch.

3. Copy of our telegram of 28 April to our Port Arthur Branch.

4. Copy of the cable reply dated 29 April (received here on 1 May) sent by our Port Arthur Branch.

These telegrams were interchanged while Mr. H. F. Ostrander, Representative of the Centennial Mill Company, Seattle, (the drawer of the bills in question) was in Shanghai.

5. Copy of letter No. 9/227 dated 16/29th April from our Port Arthur Branch.

The above copies of correspondence we are sending you at the request of Mr. Ostrander.

We have no further news from our Port Arthur Branch re-

garding these bills, communication with that port being at present interrupted.

We are, dear Sirs,

Yours faithfully,

(Signed) J. C. BERGENDAHL,  
M. SPEELMAN.

BANQUE RUSSO-CHINOISE.

COPY OF A TELEGRAM DATED 22d APRIL 1904 SENT  
TO PORT ARTHUR BRANCH FROM SHANGHAI  
OFFICE.

Representative  
Centennial Mill Company  
Seattle  
Requests us to enquire of you  
What  
Drafts on  
Clarkson & Co. Port-Arthur  
Unpaid  
Telegraph total amount.

COPY OF A TELEGRAM DATED 28th APRIL SENT TO  
PORT ARTHUR BRANCH FROM SHANGHAI OF-  
FICE.

Following is strictly private  
Referring to our telegram of 22nd April 1904  
Representative  
Hears  
Clarkson & Co. Port Arthur  
Have sold  
Goods  
Without  
Paying  
Find out the truth of  
This report  
Telegraph the result.

COPY OF A TELEGRAM DATED 29th APRIL 1904, RECEIVED BY SHANGHAI OFFICE ON 1st MAY 1904 FROM PORT ARTHUR.

Referring to your telegram of 28th April 1904.

All documents are in our hand

Gold Dollars 23,468.40

Payment refused because

Goods are not landed

Remaining

Bills

Goods are in the hand of

Clarkson & Co. Port Arthur

They have sold

Payment is promised shortly.

Port Arthur, 16/29th April, 1904.

No. 9/227.

RUSSO-CHINESE BANK,  
Shanghai.

Nat. Bank of Comm. Seattle rem'ces for coll. (No. 1412/6488, 1455/6500, 1598/7035, 1690/7392)

Dear Sirs:

In reply to your telegram of the 15/28-IV-1904 reading "Ref. to your telegram 9/22-IV-04 Representative (Centen. Mill Co.) he fears Clarkson & Co. Port Arthur have sold goods without paying. Find out the trust of this report telegraph result"

We wired you to-day as per copy enclosed, contents of which we hereby confirm.

You will learn from said telegram that all shipping documents, relative to the 4 bills in question are in our hands. The docs cover the following merchandise:

Bill No. 1412/6386 G\$ 4136.—accepted pr. 27/2/04 4000 sacks "Russo-Chinese" flour ex Pleiader, Seattle 5/X/03.

Bill No. 1455/6500 G\$16155.20 accepted pr 8/3/04 1000 sacks "Bluestem" flour 14688 sacks "Russo-Chinese" flour ex "Tremont" Seattle 25/X/03.

Bill No. 1559/7035 G\$36194.80 accepted pr. 17/IV/04 35312 sacks "Russo-Chinese" flour ex "Hyades" Seattle 9/XII-1903.

Bill No. 1690/7392 G\$23468.40 at 90 d/s D/P unaccepted 22896 sacks "Russo-Chinoise" flour ex "Pleaiader" 2/1/03.

The flour relative to the first three bills is in the hands of Clarkson & Co. and has been sold by them. They promised to take up the bills as soon as they get the money of their sale, while acceptance and payment of bill No. 1690/7392 is refused on account of the 22896 sacks flour having not been landed here.

Bills No. 1412/6386 & No. 1455/6500 could not be protested owing to the absence of the notary public at that time, and have been returned to the National Bank of Commerce of Seattle. The relative documents however are still in our hands. Bill No. 1559/7035 is due to-morrow and shall be protested if not paid.

The fact that Clarkson & Co. got into possession of the goods though the BL are in our hands is due to their being the agents for the steamers carrying same, and could in no way be impeded by us.

Yours faithfully,

RUSSO-CHINESE BANK.

(Port Arthur Branch)

(Signed)

P. P. OWINASKINE.

P. P. FRIEDBERG.

17/30-IV-1904.

P. S. Bill No. 1412/6386 G\$4,136.00 and No. 1455/6500 G\$16,155.20 have been paid today.

(Signed)

FRIEDBERG.

COPY OF LETTER RECEIVED FROM H. F. OSTRANDER,  
SEATTLE.

Seattle, July 8th, 1904.

The Managers,  
Russo-Chinese Bank,  
Shanghai, China.

Dear Sirs,

You will doubtless recall the writer's conversation early in May last with one of your good selves and you Mr. Speel-



man at which time you promised to send to the National Bank of Commerce this city, copy of letter you had just received from your Port Arthur branch giving full particulars as to the status of certain drafts drawn by the Centennial Mill Co. on Messrs. Clarkson & Co. Port Arthur, and forwarded by the National Bank of Commerce to your Branch therefor collection.

As this letter has not been received I should be greatly obliged if you would make inquiries concerning it and for the despatch of a copy thereof to the Bank here in case the letter was forwarded in due course.

Thanking you, I am

Very truly yours,

(Signed)

Shanghai, 6th August 1904.

H. F. Ostrander, Esq.

Centennial Mill Company, Seattle.

Dear Sir,

We beg to acknowledge receipt of your favor of the 8th ultimo, contents of which have been noted.

As requested, we are forwarding to-day to the National Bank of Commerce, Seattle, copies of telegrams that were exchanged, during your stay in Shanghai, between Port Arthur Branch and ourselves re. certain bills on Clarkson & Co. Port Arthur, as well as copies of the letter in question from our Port Arthur Branch No. 9/227 of 16/29th April 1904, and trust same will enable the Bank to find out how they stand with reference to these bills.

We are, dear Sir,

Yours faithfully,

RUSSO-CHINESE BANK,

(Signed) BERGENDAHL.

SPEELMAN.

As I remember, the first draft for \$52,925. drawn by the Centennial Mill Co. on Clarkson & Co. at Port Arthur was received by the Port Arthur Bank from the National Bank of Commerce in April, 1902.

Yes, the instruction of the National Bank of Commerce was to the effect that the drafts drawn on Clarkson & Co. were to be accepted by Clarkson & Co., and that it was to hold the documents, bills of lading, etc., securing the drafts and not deliver them to Clarkson & Co. until they were paid. But it did not concern itself with the goods mentioned in those documents. And did not deliver or permit Clarkson & Co. to take possession of it. Clarkson & Co. appropriated the flour themselves on their own risk and responsibility.

It was not the business of the bank to look after the goods and in fact, it did not know in what manner Clarkson & Co. made operations on these drafts.

Only the consignor is mentioned in the bill of lading accompanying the draft for \$36,194.80. The consignee is not mentioned. This bill of lading was provided only by the inscription of the firm Centennial Mill Co. There are no other endorsements.

No, the bank had no legal right to take into its possession or control the flour covered by such bills of lading without having instructions to that effect from the National Bank of Commerce.

In December, 1903, the Port Arthur Branch of the Russo-Chinese Bank opened to Clarkson & Co. a credit up to 50,000 roubles, covered by bills of exchange drawn by Clarkson & Co., in Port Arthur on the same firm in Vladivostok, payable 2000 roubles January 15/28 and 3000 roubles on the 15/28 of each month thereafter. Clarkson & Co. had no right to exceed the credit opened to them, and there existed no agreement between them and the bank in virtue whereof they could dispose of the cargo mentioned in the documents kept by the bank.

Clarkson & Co. paid the bank at Port Arthur no money between March 26th and April 1st, old style, 1904.

Yes, the bank has records showing that it notified the National Bank of Commerce of the nonpayment of the drafts for \$4136 and \$16,155.20 on April 13/26, 1904. This was done by letter. (See ante, page 31.)

The drafts for \$4136 and \$16,155.20 could not be protested owing to the absence of the notary from Port Arthur at the

time when they were due, and they were returned to the National Bank of Commerce in the letter above mentioned, together with two copies of a certificate of the absence of the Notary from Port Arthur.

The draft for \$36,194.80 was protested and returned to the National Bank of Commerce together with the protest in letter dated May 13, 26, 1904. The draft for \$36,194.80 together with the deed of protest was received from the Notary in Port Arthur at the time when communication with Port Arthur was cut off from the shore as well as from the seaside.

The amounts paid on the drafts for \$4136 and \$16,155.20 were remitted by the Port Arthur Branch by telegraph on April 17/30, 1904.

The bank did not prior to the sale of flour to Ginsburg advance to Clarkson & Co. money with which the drafts for \$4136 and \$16,155.20 were paid. Nor did it out of the proceeds of the sale of the flour shipped on the "Hyades" reimburse itself for the money thus advanced.

I know the date at which the Japanese Government returned to the Russo-Chinese Bank the papers and effects of the Bank that were captured at the time Port Arthur fell because as soon as permission from the Japanese Government had been received the representative of the bank Mr. A. Friedberg left for Port Arthur in February, 1906, to solicit of the Japanese authorities that books papers and values belonging to the Russo-Chinese Bank be returned. The same were returned in March, 1906.

In my capacity as officer of the bank in 1904 and through being present at the time when the Japanese military authorities occupied the bank's building and confiscated whatever it contained and having given explanation to the Japanese authorities I know what books, documents, etc., were confiscated by the Japanese. And after receipt of the same in St. Petersburg I personally set them to rights. Upon examination all that had been confiscated in the bank's building in Port Arthur were returned.

I am not a lawyer by profession.

I know what official appointment A. Belinsky held by virtue of the office, though I have never seen his official appointment.

Thereupon the plaintiff read in evidence the deposition of Paul Bock, taken and certified before the Honorable James W. Ragsdale, United States Consul at St. Petersburg, Russia, and certified by him in his official capacity. The deposition of PAUL BOCK, a witness on behalf of the plaintiff, was as follows:

Deposition of Paul Bock, on Behalf of Plaintiff.

My name is Paul Bock; I am forty-six years old. I reside at St. Petersburg and am manager of the Russo-Chinese Bank at St. Petersburg. I have been in that employment since the year 1896.

The head office of the Russo-Chinese Bank at St. Petersburg had in 1894 between 45 and 50 different branches located at various points in Russia and Siberia, Paris, San Francisco, and Calcutta and had agencies at London, New York, Bombay and Chefoo.

Interrogatory 5. State what you know as an officer of the Russo-Chinese bank of the transaction concerning a certain draft for \$36,194.80 drawn by the Centennial Mill Company upon Clarkson & Co. of Port Arthur and transmitted to the Port Arthur Branch of the Russo-Chinese Bank.

Answer. On April 9/22, 1904, the National Bank of Commerce enquired by wire about the fate of their remittance on Port Arthur and on April 17/30, on receipt of the telegraphic reply from Port Arthur the bank at St. Petersburg wired to the National Bank of Commerce that the same had not been paid by Clarkson & Co. but the latter promised to pay shortly. This telegram was confirmed by letter.

Later the National Bank of Commerce claimed that the draft for \$36,194.80 had been paid by Clarkson & Co. to which the bank at St. Petersburg replied by letter to the effect that by reason of the interruption of communication with Port Arthur it was impossible to trace the matter at that time. The National Bank of Commerce continued to insist that either the money or documents in duplicate be returned to it immediately. After considerable correspondence and on the 27th October/9th November, 1904, the Russo-Chinese Bank in order to discontinue the disagreeable incident decided to remit and did remit the sum claimed by the National Bank of Com-

merce, conditionally by letter. The sum remitted was \$36,013.70.

Upon receipt of the draft for \$36,013.70 and about December 16/29, 1904, the National Bank of Commerce claimed interest on the draft and the same was remitted in a sum of \$2,298.49, which sum included \$181.10 charges, theretofore retained.

In June, 1906, when the books and documents of the Port Arthur branch were received in St. Petersburg, I examined the books and finding that they did not show that the draft for \$36,194.80 had been paid by Clarkson & Co. but on the contrary had been protested for nonpayment and the draft with the deed of protest mailed to the National Bank of Commerce and that the documents attached to the draft were among the documents of the Port Arthur branch recovered from the Japanese, for the Bank I made demand upon the National Bank of Commerce to refund the amount of the two remittances before mentioned with accrued interest.

On April 9/22, 1904, the St. Petersburg bank received a telegram from the National Bank of Commerce in regard to its draft. This telegram is produced and attached to my deposition, being in cipher with the translation.

The bank at St. Petersburg wired at once to Port Arthur for information and on receipt of the reply telegraphed to the National Bank of Commerce on 17/30 April, as follows:

"As far as we can judge Clarkson financial standing there is no change Bills Port Arthur No. 1588, No. 1690 payment refused Goods have not yet arrived Remaining bills Port Arthur Clarkson promises to pay shortly."

This telegram as well as the letter previously referred to were confirmed by letters mailed to the National Bank of Commerce, copies of which letters are hereto appended.

Although there was war between Russia and Japan at the time of the receipt of our first information from the National Bank of Commerce, and Port Arthur was blockaded by the Japanese navy, the Port Arthur branch of the Russo-Chinese Bank continued to work as before. This state of affairs continued until the capitulation of Port Arthur which took place December 20th, 1904/January 5th, 1905. A few days later



the Japanese military authorities took possession of the Russo-Chinese Bank at Port Arthur and confiscated all books and documents of the bank. The books and documents were recovered from the Japanese authorities in March, 1906, and are in the office of the bank at St. Petersburg.

Charles Richter and Alexander Friedberg were officers of the Russo-Chinese Bank at Port Arthur, holding power of attorney. Alexander Drozdov was an employee of the bills department of that bank.

The bank at St. Petersburg did have correspondence with the National Bank of Commerce of Seattle in regard to the draft transaction and I annex herewith its files for the years 1904-5-6 containing all the letters and telegrams received by the Russo-Chinese Bank at St. Petersburg from the National Bank of Commerce of Seattle and the copies of the replies, taken from the letter copying-books into which the Russo-Chinese Bank copied the letters and telegrams it sent to the National Bank of Commerce concerning said draft.

As I said before on October 27/November 9, 1904, the Russo-Chinese Bank at St. Petersburg mailed a check on Messrs. Ladenburg, Thalmann & Co. New York, for \$36,013.70 to the National Bank of Commerce with letter of that date and later on, receiving a further demand of the National Bank of Commerce for interest and a refund of charges the bank mailed another check for \$2,298.49, Dec. 16/29, 1904, with letter of that date.

I have examined the books and records of the bank at Port Arthur.

The National Bank of Commerce of Seattle has not repaid the Russo-Chinese Bank the sums of money above mentioned, as paid on account of the draft for \$36,194.80 with accrued interest thereof or any part thereof.

I annex copy of the letter of the Port Arthur Branch of the Russo-Chinese Bank, date 13/26 May, 1904, addressed to the National Bank of Commerce of Seattle, certified by the Consul General of the United States of America at St. Petersburg, on January 11th, 1907, as follows:



Copy.

874.

13/26 May 4.

National Bank of Commerce, Seattle, Wash.

Your remi'ce for coll. 11/XII—03 #1559/7035 G\$36194.80  
pr 17/IV—1904 D/P On Clarkson & Co, Port Arthur.

Dear Sirs,

This had to be protested for non-payment and is herewith  
returned together with its deed of protest. Kindly acknowl-  
edge receipt and remit on our account to the First National  
Bank of your city.

Rbs. 566.25 sundry ch'ges as per following description, thus  
obliging.

Rbs. 271.50 3/8% comm.

“ 184.25 protest

“ 2.— Carriage fare

“ —.50 postage

“ 108.— billstamp.

---

Rbs. 566.25.

The reason of this dishonor is that the goods have not been  
landed here. The shipping docts are being kept here pending  
receipt of your instructions.

Yours faithfully,

RUSSO-CHINESE BANK,

(Port-Arthur Branch).

(Signed) A. D. MAMONOFF,

p. p. FRIEDBERG.

Enclosed:

one bill (first)

one bill (second)

one deed of protest.

CONSULATE-GENERAL OF THE UNITED STATES OF  
AMERICA.

St. Petersburg, Russia.

I, Ethelbert Watts, Consul-General of the United States  
of America within and for the City and Empire aforesaid, do  
hereby certify that I have compared the above with the text  
on Page 306 of the Press-copy Book #15 of the Russo-Chinese  
Bank of the Port-Arthur Branch and have found the above to  
be a true and verbatim copy of the same.

In witness whereof I have hereunto set my hand and affixed the seal of this Consulate-General this 11th day of January, A. D. 1907.

(Seal)

AMERICAN CONSULATE-GENERAL

St. Petersburg, Russia.

ETHELBERT WATTS,

Consul-General.

N. F.

(Stamp:) American

Consular Service

\$2

Fee Stamps

11/1/07.

### CROSS-EXAMINATION.

During the period of time between December 1st, 1903, and August 1st, 1904, I was in St. Petersburg. St. Petersburg was my station.

My knowledge of the transactions between the Russo-Chinese Bank at Port Arthur and the National Bank of Commerce relating to the drafts for \$4136 and \$16,155.20 and \$36,194.80 drawn by the Centennial Mill Co. in favor of the National Bank of Commerce upon Clarkson & Co. at Port Arthur is acquired from an examination of the books and records of the Bank; not from personal knowledge.

And thereupon the letters and telegrams attached to the deposition of the witness Paul Bock were read to the jury as follows:

Seattle, Wash., Mar. 15, '04.

The Manager

Russo-Chinese Bank,

St. Petersburg, Russia.

Dear Sir:

We are in receipt of your favor of February 25th, enclosing your draft on San Francisco for Roubles 8,465.12 for which accept thanks.

In advising you your Vladivostok Branch probably failed to request that you remit us in New York funds, San Francisco not being a par point, exchange being at a discount of from G \$1.00 to G \$1.25 per M.

Hereafter should any further transfers be made from either Port Arthur or Vladivostok for our account through your good selves, would respectfully request that you send us New York funds.

Very respectfully yours,  
R. R. SPENCER.

THE NATIONAL BANK OF COMMERCE.

Seattle, Wash., Apr. 21, '04.

The Manager,  
Russo-Chinese Bank,  
St. Petersburg, Russia.

Dear Sir:

I cabled you to-day as per enclosed confirmation. We are carrying for our various customers Bills, a list of which is enclosed herein, showing approximate maturity and amounts.

Since trouble commenced in the Far East, Port Arthur has been cabling us remittances through you, not trusting to the mails. If that is still their policy some of the items are considerably past due.

We received a rather disquieting advice to-day, that Clarkson or his Agent, had become possessed of the flour and disposed of it, not accounting for the proceeds. Of course we do not know that this is true, but the fact that we have received no remittances of late would indicate that something is wrong.

All of the items are in the hands of your two Branch Offices. We have received no advice from them, telegraphic or otherwise, in regard to the past due items. If the reports are true, we do not understand why your Offices did not notify us on the Maturity of the drafts.

Will you kindly use your facilities for ascertaining the exact conditions, and if the draft for G\$16,155. accepted to mature March 8th, was not paid, why we were not advised of the fact promptly.

We have had a great deal of trouble with your Port Arthur Office. They have held non-interest bearing drafts as long as sixty days without procuring acceptance, or advising us of

their dishonor, and then have cabled us the fact that acceptance was refused at our expense.

We attempted to cable Port Arthur, but the Companies here advise us that the line is closed to mercantile use.

When you have completed the transaction, if you will advise us as to the amount of expense incurred for telegrams, etc., will remit your San Francisco or New York Office as you may request. Please see that we are protected in the premises in the usual commercial custom.

Very respectfully,  
R. R. SPENCER.

## PORT ARTHUR.

Date of Draft.	Drawer.	Drawee.	Term.	Amount.	Accepted to mature.
Oct. 6/03	Centennial Mill Co.	Clarkson & Co.	90 d/s	G\$4,136.00	Feb. 27/04
Oct. 26/03	" "	"	90 d/s	16,155.20	Mar. 8/04
Dec. 11/03	Sprague Roller Mills	"	90 d/s	1,100.00	Apr. 17/04
Dec. 11/03	Centennial Mill Co.	"	90 d/s	36,194.80	Apr. 17/04
Dec. 31/03	Sprague Roller Mills	"	90 d/s	1,100.00	No notice of acceptance.
Dec. 10/03	Armour & Company	G. S. Zozounoff	30 d/s	270.	"
Dec. 31/04	M. J. Connell	Economical Arm of the Military & Police	30 d/s	269.60	"
Jan. 2/04	Centennial Mill Co.	Clarkson & Co.	90 d/s	23,468.40	"
Jan. 5/04	Borden's Con. Milk Co.	G. S. Zozounoff	30 d/s	375.	"
Jan. 5/04	" "	"	30 d/s	375.	"
Jan. 25/04	Armour & Company	"	30 d/s	270.00	"
Feb. 8/04	"	Peteritz Bros.	30 d/s	283.10	"

## VLADIVOSTOK.

Dec. 11/03	Centennial Mill Co.	Dong Shun	60 d/s	4,175.16	"
Dec. 11/03	" " "	"	90 d/s	4,196.09	"

St. Petersburg

10/23 April 1904

National Bank of Commerce, Seattle.

Gentlemen:—

We beg to acknowledge receipt of your cable of the 22nd. inst. worded as follows:

"Certain unfavorable reports are being circulated with regard to Clarkson, Port Arthur. Ascertain why has not remittance been sent us by Sinorusse. Where are the bills of lading? Bills amount to Port Arthur \$82,000.—Vladivostok \$8,000.—Telegraph as soon as possible cannot communicate with because telegraph line is broken, will be responsible for the expense."

We have at once wired your enquiry to our Port Arthur

and Vladivostok Branches and we shall not fail to pass on to you their answers, when received.

We remain, gentlemen,

Yours faithfully,

RUSSO-CHINESE BANK.

St. Petersburg

19/2nd. May 1904

National Bank of Commerce, Seattle.

Gentlemen:—

With reference to your enquiry by cable of 22nd. April ult. we have cabled you on 17/30 April as follows:

“As far as we can judge Clarkson financial standing there is no change bill Port Arthur No. 1588 No. 1690 payment refused goods have not yet arrived remaining bills Port Arthur Clarkson promise to pay shortly Sinorusse Vladivostok can find no trace of matter mentioned in your telegram telegraph us when did you send documents” which we confirm.

We are now awaiting your answer by telegram and remain, Gentlemen,

Yours faithfully,

RUSSO-CHINESE BANK.

21/4th. May 1904.

The National Bank of Commerce,  
Seattle, Wash.

Your remittance for collection 11/1—1904

No. 1601/7378 G\$375.—on G. S. Sozounoff, Port Arthur

No. 1607/7379 G\$375.—on G. S. Sozounoff, Port Arthur

Dear Sirs:—

Please note that at the request of our Shanghai Branch who wrote us as follows:—

“No. 9/79...The Representative of Borden's Condensed Milk Co. New York called upon us with reference to 2 drafts for G\$375.—each on G. S. Sozounoff, P/Arthur, against 100 c each of condensed milk which should have been received from you through the National Bank of Commerce, Seattle. He informs us that these goods are in Shanghai and asks that you should send us the relative drafts and documents and he

will pay them here and take delivery of the cargo; he says such an arrangement has been made with your good selves in case of trouble . . . " we have sent them the above two bills and documents to be collected at Shanghai, and instructed them to remit you a draft on New York in cover of proceeds.

Trusting that you will find this to be in order, we remain, dear sirs,

Yours faithfully,

R. C. B.

PORT ARTHUR BRANCH.

St. Petersburg

22/5th. May 1904.

The National Bank of Commerce,

Seattle, Wash.

Registered.

Gentlemen :

By telegraphic order from our Vladivostok Branch, we are to remit you :

Rs. 8,500,—less

Rs. 31.88 commission  $\frac{3}{8}\%$

" 34.88 " 3.—cost of Vladivostok's wire.

Rs. 8,465.12 at exch. 196 \$4,318.94 which please find herewith in a cheque on New York 2208.

Kindly acknowledge receipt of same and oblige,

Yours faithfully,

RUSSO-CHINESE BANK.

St. Petersburg.

28/11th. May 1904

The National Bank of Commerce,

Seattle, Wash.

Gentlemen :

We acknowledge receipt of your letter of the 21st April enclosing a list of your remittances to our Port Arthur and Vladivostok Branches.

You will have received in the meantime our wire of the 17/30th April in answer to your cable to us dated April 22nd. However, we shall write to our Port Arthur Branch, requesting from them a detailed answer to your enquiry.



We beg to point out that *you* above-said cable mentioned a remittance to our Vladivostok Branch of \$8,000.—o/Clarkson & Co. which remittance our Branch informed us they could not trace (as we wired you on the 17/30th April). But we find from your list that you remitted to Vladivostok on the 27/11th December:

\$4,175.16 o/Don Shun

\$4,196.09 “

Would not the cheque for Rs. 8,500 (\$4,318.94) that we remitted you the 22/5th. inst. be in payment of part of those drafts? The cost of our telegrams to Port and Vladivostok, of our Branches answers, and of our cable to you dated 17/30th. March amounts to:

Rs. 54.50 at 196.

\$27.80 which please remit for our account to Messrs. Ladenburg, Thalmann & Co., New York.

We remain, Gentlemen,

RUSSO-CHINESE BANK,

NATIONAL BANK OF COMMERCE.

Seattle, Wash., May 23, 1904.

The Manager,

Russo-Chinese Bank,

St. Petersburg, Russia.

Dear Sir:

We beg to acknowledge receipt of your favor of May 5th. enclosing New York draft for G\$4,138.94, cabled you from your Vladivostok Branch for our credit.

Very respectfully,

R. R. SPENCER.

St. Petersburg,

12/25 June, 1904.

The National Bank of Commerce,

Seattle, Wash.

Registered.

Dear Sirs:

By telegraphic order from our Vladivostok Branch, we are to remit you:

rs. 8,500.—less

Rs. 31.88 commission  $\frac{3}{8}\%$   
 34.88      3.      Cost of Vladivostok's wire

---

Rs. 8.465.12 at exch. 196

U. S. \$4,318.94 which please find herewith in a cheque on New York No. 2283.

Kindly acknowledge receipt of same and oblige, dear sirs,

Yours faithfully,

RUSSO-CHINESE BANK.

13/26 May 1904

The National Bank of Commerce,

Seattle, Wash.

Your remittance for Coll. II/XII—03

No. 1559/7035 G\$36194.80 pr 17/IV—1904

D/P on Clarkson & Co. Port Arthur.

Dear Sirs:

This had to be protested for non-payment and is herewith returned together with its deed of protest. Kindly acknowledge receipt and remit on our account to the First National Bank of your City

Rbs. 566.25 Sundry charges as per following description, thus obliging

Rbs. 271.50  $\frac{3}{8}\%$  comm.

184.25 protest

2.— carriage fare

.50 postage

108.—

---

Rbs. 566.25

the reason of dishonor is that the goods have not been landed here. The shipping docs are being kept here pending receipt of your instructions.

Yours faithfully,

R. C. B. PORT ARTHUR BRANCH

enclosed one bill (first)

“ “ (second)

“ deed of protest

7/20th. June 1904

The National Bank of Commerce,  
Seattle, Wash.

Your remittances for collection sent us on the  
10/XII/03 No. 1554/7052 G\$270.—at 30 d/s D/P on G. S.  
Zozounoff  
31/XII/03 No. 1558/7396 G\$1100.— at 90 d/s D/P on Clark-  
son & Co  
31/XII/03 No. 1587/7397 G\$269.60 at 30 d/s on Sec. Ecom.  
des Offi  
2/1/04 No. 1590/7392 G\$23468.40 “ 90 d/s D/P on Clarkson  
& Co.

Dear Sirs:—

These had to be protested for non-acceptance and are here-  
with returned. Kindly acknowledge receipt, and remit on our  
account to Messrs. Ladenburg Thalmann & Co. New York  
Rs. 410.04 Sundry charges as per following description, thus  
obliging

on bill	No. 1554	No. 1588	No. 1587	No. 1690	
comm. $\frac{3}{8}\%$ .....	2.01	8.17	2.	174.26	
protest.....	6.	11.05	5.95	121.05	
billstamp .....	.85	3.30	.90	70.50	
postage .....	.50	.50	.50	.50	
carriage fare for all four bills.....					2.—
	<hr/> 9.36	<hr/> 23.02	<hr/> 9.35	<hr/> 366.31	<hr/> 2.—

The shipping documents are kept here pending receipt of  
your instructions.

Yours faithfully

R. C. B. PORT ARTHUR BRANCH

Enclosed  
4 bills  
4 deeds of protest

## NATIONAL BANK OF COMMERCE

Seattle, Wash. July 7, '04.

The Manager,  
 Russo-Chinese Bank,  
 St. Petersburg, Russia.

Dear Sir:—

We now have the following drafts in the hands of your Port Arthur Agency, besides several small ones on other Parties which are past due and unpaid.

Mr. Clarkson advises the drawers of these drafts that all were paid before maturity. Can you trace this matter for us? The particulars of the larger drafts in question are as follows:

Dec 11 '03 d/s Clarkson & Co. G\$36,194.80

Dec. 31 '03 90 d/s Clarkson & Co. G\$1,100.00

Jan 2 '04 d/s Clarkson & Co. G\$23,468.04

There is thus outstanding and past due over G\$60,000.— of this paper.

We dislike to trouble you in the premises, but all letters addressed by us to Port Arthur are returned.

Very respectfully,

St. Petersburg 10/23d July 1904  
 The National Bank of Commerce,  
 Seattle, Wash.

Dear Sirs:—

We have duly received your favor of the 7th July which had our best attention.

We are unable for the present to correspond with Port Arthur and are not in a position to trace the matter you refer to. As soon as we find it possible to investigate that subject, we shall not fail to revert to it.

We remain, dear sirs,

Yours truly,

RUSSO-CHINESE BANK.

THE NATIONAL BANK OF COMMERCE

Seattle, Wash., July 12, 1904

The Manager,  
 Russo-Chinese Bank  
 St. Petersburg, Russia.

Dear Sir:—We are in receipt of your favor of June 25th,

enclosing New York draft for G\$4,138.94 in payment of a draft for 8,500 roubles sent your Vladivostok Office.

Very respectfully yours

R. R. SPENCER

THE NATIONAL BANK OF COMMERCE

Seattle, Wash. Aug 4, 1904

The Manager,

Russo-Chinese Bank,

St. Petersburg, Russia.

Dear Sir:—

We are still without any returns from the 90 days sight draft, dated December 11th, 1903, drawn on Clarkson & Co. for G\$36,194.80 and sent to your Port Arthur Office. Some time since we sent you a list of drafts on various parties long since overdue, from which we have received no returns.

Mr. Thompson, president of the Centennial Mill, has written Mr. Clarkson in regard to his drafts and I now have before me four letters from Mr. Clarkson complaining of Mr. Thompson's letters, and asserting that all of his drafts were paid in to your Port Arthur office one before maturity. The particular one in question, six days prior thereto. I quote from his letters which are very long and circumstantial as follows:

Under date of May 10, he writes:

"In regard to our drafts will say, that we have paid every one of your drafts promptly. In fact the last one calling for Rbls. 74,000 for flour ex 'Hyades' (the one in question) was paid some six days before it came due. At our request the Russian Chinese Bank here telegraphed to their branch in Port Arthur and among other things the Port Arthur bank notified the Bank here that they had received money on our account and had applied it to take up your draft for the Hyades flour."

And again having reference to the same draft and under date of June 15th. Mr. Clarkson writes:

"In regard to the last draft which amounted to some Rs. 74,000 covering Hyades flour will say, we have telegraphic advice from bank at Port Arthur that this was also paid."

From the above statements there is evidently something wrong somewhere. Either Mr. Clarkson is not stating facts

or your Port Arthur office has retained funds belonging to this institution.

We respectfully request that you instruct your office at Port Arthur or Harbin to immediately do one of two things, remit us the amount of the draft plus interest to estimated date of return of funds here or return us the bills of lading and drafts in duplicate with the statement of your Manager that Mr. Clarkson has not paid them as stated by him. In the latter event we should like to know what disposition has been made of the flour. We would also request that you instruct them to report on all other of our drafts in their hands and for which payment has not been made to us.

In conclusion we desire to state further in regard to your Port Arthur Branch that we have done a great deal of business with them prior to the outbreak of hostilities. That in thirty-three years of banking experience the writer has never had as much trouble as with transactions through this agency. They have repeatedly retained drafts in their possession which did not draw interest from two to three months without securing acceptance or protesting and returning drafts, simply favoring their customers at our expense. This has also happened at your Vladivostok Agency. In remitting us they almost invariably remitted short, sometimes as much as thirty days interest.

I finally wrote them that conditions were unbearable and as we were compelled to send them the items, there being no other Bank there, and if they did not cure the evils complained of that I should take the matter up with St. Petersburg. This had a salutary effect and from that time on we had but little to complain of until since the outbreak of hostilities.

I dislike very much to enter complaints but we expect in the future to do considerable business both in Port Arthur and Vladivostok and we would very much like to transact it with as little friction as possible.

Thanking you in advance for your prompt attention to the foregoing, I remain,

Very respectfully yours,

R. R. SPENCER.

Per S. S. "Empress of China"

Shanghai 5th August, 1904.



No. 9/2

The National Bank of Commerce,  
Seattle.

Dear Sirs:—

Confirming our respects of 6th ultimo, we beg to refer to your following remittances all drawn on Messrs. Clarkson & Co., Port-Arthur, and sent by you direct to our Branch at that Port for collection:

Your No. 1412 for G. \$	4136.00
“ 1455 G. \$	16155.20
“ 1559 G. \$	36194.80
“ 1690 G. \$	23486.40

We beg to hand you herewith:

1. Copy of our telegram of 22nd April to our Port Arthur Branch.

2. Copy of the cable reply dated 23rd April (received here on 25th April) sent by our Port Arthur Branch.

3. Copy of our telegram of 28th April to our Port Arthur Branch.

4. Copy of the cable reply dated 29th April (received here on 1st May) sent by our Port Arthur Branch.

These telegrams were interchanged while Mr. H. F. Ostrander, representative of the Centennial Mill Company, Seattle (the drawers of the bills in question) was in Shanghai.

5. Copy of letter No. 9/227 dated 6/29th April from our Port Arthur Branch.

The above copies of correspondence we are sending you at request of Mr. Ostrander.

We have no further news from our Port Arthur Branch regarding these bills, communication with that port being at present interrupted.

We are, dear sir,

Yours faithfully,

(Signed) J. C. BERGENDAHL,  
M. SPEELMAN.

Enclosure.

COPY OF A TELEGRAM DATED 22nd APRIL, 1904, SENT  
TO PORT ARTHUR BRANCH FROM SHANGHAI  
OFFICE.

Representative  
Centennial Mill Company  
Seattle  
Request us to require of you  
what  
draft on  
Clarkson & Co. Port Arthur  
Unpaid  
Telegraph total amount.  
Enclosure.

COPY OF A TELEGRAM DATED 23rd APRIL, 1904, RE-  
CEIVED BY SHANGHAI OFFICE ON 25th IDEM  
FROM PORT ARTHUR BRANCH.

Referring to your telegram of the 22nd April.  
Gold dollars 79,954.40

COPY OF A TELEGRAM DATED 28th APRIL SENT TO  
PORT ARTHUR BRANCH FROM SHANGHAI OFFICE

Following is strictly private  
Referring to our telegram of 22nd April 1904  
Representative  
Hears  
Clarkson & Co. Port Arthur  
Have sold  
Goods  
Without  
Paying  
Find out the truth of  
This report  
Telegraph the result.  
Enclosure.

COPY OF A TELEGRAM DATED 29th APRIL, 1904, RE-  
CEIVED BY SHANGHAI OFFICE ON 1st MAY, 1904  
FROM PORT ARTHUR.

Referring to your telegram of 28th April 1904  
All documents in our hand

Gold Dollars 23,468.40  
 Payment refused because  
 Goods are not landed  
 Remaining  
 Bills  
 Goods are in the hands of  
 Clarkson & Co. Port Arthur  
 They have sold  
 Payment is promised shortly  
 Enclosure.

No. 9/227 Port Arthur 16/29th April 1904

Russo-Chinese Bank,  
 Shanghai.

Nat. Bank of Com. Seattle rem'ces for coll.

No. 1412/6386

1455/6500

1599/7035

1690/7322

Dear Sirs:

In reply to your telegram of the 15/28-IV-1904 reading:

"Ref. to your telegram 9/22-IV-04 Representative (Centen. Mill Co) he fears Clarkson & Co. Port Arthur have sold goods without paying. Find out the truth of this report telegraph result."

—we wired you today as per copy enclosed, contents of which we hereby confirm.

You will learn from said telegram that all shipping documents relative to the 4 bills in question are in our hands. The docts cover the following merchandise:

Bill No. 1412/6386 G.\$1436 accepted pr 27/2/04 400 sacks "Russo-Chinese" flour ex *Pleiader* Seattle 5/x/03

Bill No. 1599/7035 G.\$36194.80 accepted pr 17/IV/04 100 sacks "Blue stem" flour 14688 sacks "Russo-Chinese" flour "Tremont" Seattle 25/x/03.

Bill No. 1599/7035 G.\$36194.80 accepted pr 17/IV/04 35312 sacks "Russo-Chinese" flour ex "Hyades" Seattle 9/XII-1903.

Bill No. 1690/7392 G.\$23468.40 at 90 d/s D/P (unaccepted)  
22896 sacks "Russo-Chinese" flour ex "*Plcaider*" 2/1/03.

The flour relative to the first three bills is in the hands of Clarkson & Co. and has been sold by them. They promised to take up the bills as soon as they get the money of their sale, while acceptance and payment of bill No. 1690/7392 is refused on account of the 22896 sacks flour having not been landed here.

Bills No. 141/6386 & No. 1455/6500 could not be protested owing to the absence of the notary public at that time, and have been returned to the National Bank of Commerce, Seattle, the relative documents however are still in our hands. Bill No. 1569/7035 is due tomorrow and shall be protested if not paid.

The fact that Clarkson & Co. got into possession of the goods though the B/L are in our hands is due to their being the agents for the steamers carrying same, and could in no way to impeded by us.

Yours faithfully,

----

RUSSO-CHINESE BANK

(Port Arthur Branch)

(Signed) p. p. OWIASKINE

p. p. FRIEDBERG

17/30/IV-1904

P. S. Bill No. 1412/6386 G \$ 4,136.00

& " 1455/6500 G \$16,155.20

have been paid today.

(Signed) FRIEDBERG.

Enclosure.

COPY OF LETTER RECEIVED FROM H. F. OSTRANDER,  
SEATTLE.

Seattle, July 8th, 1904.

The Managers

Russo-Chinese Bank,

Shanghai, China.

Dear Sirs:—

You will doubtless recall the writer's conversation early in May last with one of your goodselves and your Mr. Speelman

at which time you promised to send to the National Bank of Commerce this city, copy of letter you had just received from your Port Arthur Branch giving full particulars as to the status of certain drafts drawn by the Centennial Mill Co. on Messrs. Clarkson & Co. Port Arthur and forwarded by the National Bank of Commerce to your branch there for collection.

As this letter has not yet been received I should be greatly obliged if you would make inquiries concerning it and for the dispatch of a copy thereof to the Bank here in case the letter was forwarded in due course.

Thanking you, I am,  
Very truly yours,  
(Signed)

Enclosure

Shanghai 6th August 1904

H. F. Ostrander, Esq.,  
Centennial Mill Company,  
Seattle.

Dear Sirs:—

We beg to acknowledge receipt of your favor of the 8th ultimo, contents of which have been noted.

As requested, we are forwarding today to the National Bank of Commerce, Seattle, copies of telegrams that were exchanged, during your stay in Shanghai, between Port Arthur Branch and ourselves re certain bills on Clarkson & Co. Port Arthur as well as copy of the letter in question from our Port Arthur Branch No. 9/227 of 16/29th April 1904, and trust same will enable Bank to find out how they stand with reference to these bills.

We are, dear sir,

Yours faithfully,

(Signed)

RUSSO CHINESE BANK  
BERGENDAHL  
SPEELMAN

THE NATIONAL BANK OF COMMERCE

Seattle, Wash., August 25, 1904

The Manager,  
Russo-Chinese Bank,  
St. Petersburg, Russia.

Dear Sirs:—

We are in receipt of a letter from your Shanghai Office, containing copies of telegrams and correspondence passing between your Shanghai office and that at Port Arthur, in one of which dated the 29th of April, your Port Arthur Office wires Shanghai, "Referring to your telegram of the 28th. of April, 1904, all documents in our hand gold dollars 23,468.40 payment refused because goods are not landed, remaining bills, goods are in the hands of Clarkson & Co. Port Arthur. They have sold, payment is promised shortly" and confirming in a letter under same date, and stating "The flour relative to the first three bills (one of which is the bill in default) is in the hands of Clarkson & Company and has been sold by them. They promised to take up the bills as soon as they get money out of their sale."

We have in our hands an affidavit made by an employee of Mr. Clarkson, in which he states that they have been in the habit (the Bank being cognizant of the fact) of taking possession of merchandise and disposing of same, oft times without even accepting the bills.

The bill in question was dated December 11th, should have arrived in Port Arthur on or before January 15th, and was not accepted until April 17th, or three months later. Meanwhile we received no notice of its dishonor or protest. This certainly shows unexcusable negligence on the part of that office.

Our client is finding serious fault with us in that we have not pressed either the collection of these bills, or return of documents before this.

We would call your attention to our letter of August 4th, and must insist that either the money or documents, in duplicate, be returned to us immediately. It takes quite a little while to hear from you and to avoid any further correspondence, would state that if our request is not complied with, we shall take steps in this country to enforce our rights against your Agency here, which I sincerely hope will not become necessary, as we do like to have our relations with our correspondent banks of the friendliest character.

Respectfully yours,

R. R. SPENCER



St. Petersburg

13/26 August 1904

The National Bank of Commerce,  
Seattle, Wash.

Dear Sirs:—

We beg to acknowledge receipt of your letter of 4th August referring to drafts on Messrs. Clarkson & Co.

We can only say in answer, that our communication with Port Arthur being interrupted, as we told you on June 10, 23d, we have no means of tracing the matter at present.

We regret very much not to be able to give you the requested information, and remain, dear sir,

Yours faithfully,

RUSSO CHINESE BANK

NATIONAL BANK OF COMMERCE

Seattle, Wash., Sept. 1, 1904

The Manager,

Russo-Chinese Bank,

St. Petersburg, Russia.

Dear Sir:—

Frank Waterhouse, Agent for Dodwell & Co., Lt'd., who in turn are Agents for the Steamship Companies carrying the flour to Messrs. Clarkson & Company, has received a cablegram from Shanghai, of which the following is a copy:

“Clarksons, Shanghai in possession of Russo-Chinese Bank certificate that all Centennial Mill Company's drafts are paid with exception of Pleiades. We will send copies certificated by American Consul.”

This cablegram comes from Dodwell & Company Ltd, at Shanghai.

The “Pleiades” flour is that which was not unloaded at Port Arthur, excepting a small part, but was carried on to Chefoo. This cablegram has reference to the “Hyades” flour.

We cannot understand that situation. Clarkson has at all times claimed this draft as paid. We have letters from your eastern offices, one of which state that the flour was taken by the Russian Government and would probably be paid for at the end of the war; another from the same source states that Clarkson had taken the flour without the formality of taking up the

bills of lading, had sold it and had promised payment as soon as he was paid. And now comes a cablegram from perfectly responsible parties stating that Clarkson has the certificate of your bank that the drafts are paid.

Our experience in this case is an entirely new and very novel one to us.

R. R. SPENCER

NATIONAL BANK OF COMMERCE

Seattle, Wash. Sept. 13, 1904

The Manager,

Russo-Chinese Bank,

St. Petersburg, Russia.

Dear Sir:—

Your favor of the 26th of August received, contents noted and unsatisfactory. While we are well aware that you have no means of communicating with Port Arthur, we are also aware that all documents have been removed by the Bank to Harbin with which point you have both telegraphic and mail communication.

Before taking any action, we will await your answer to our letters of August 25th, and September 1st.

Very respectfully,

R. R. SPENCER

St. Petersburg

16/1st. October 1904

The National Bank of Commerce,

Seattle, Wash.

Dear Sirs:—

In reply to your favor of the 13th, September, we beg to inform you that our Port Arthur Branch continues to work as before, and therefore, contrary to your supposition, Bills for Collection and similar documents on that place are in Port Arthur. This is also the case with the documents referred to by you.

We may add that at the outbreak of the war, our Port Arthur Branch sent at once all bills and documents to Harbin, as the notary public had ceased his work, but when he later on

resumed his duties in Port Arthur, all remittances had to be returned there from Harbin.

We are doing our best to obtain information about the fate of your remittances, and as, from time to time, news leak out from Port Arthur, we may perhaps, sooner or later, receive information about your drafts.—But, of course we cannot assume any responsibility, in the present state of politics in the Far East, as to whether and when such news may reach us.

Any affidavit by an employee of Mr. Clarkson, concerning the delivery or payment of these documents or part of them, cannot serve as proof to us. We are unable, at present, as you will understand, to examine of correctness of such affidavit, but may state that on another occasion, Mr. Clarkson had also insisted having certain sums to his credit with our Bank which assertion, in the end, proved to be erroneous.

We can only accept an information which comes direct from our Port Arthur Branch, and until receipt of such, we are not able to acknowledge the correctness of any affidavit or information given by third parties.

We may only repeat that, not alone to safeguard you, but also in our interests, we are doing our utmost to get some definite information from Port Arthur concerning your remittances, and shall not fail to promptly communicate to you any news which may be received by us.

We trust that this most disagreeable incident will not affect our former good relations with your valued institution,—the more so as you will certainly recognize that the same is in no way due to any fault on our part.

We remain, dear sirs,

Yours faithfully,

BANQUE RUSSO-CHINOISE.

NATIONAL BANK OF COMMERCE.

Seattle, Wash., Oct. 12/04.

The Manager,

Russo-Chinese Bank,

St. Petersburg, Russia.

Dear Sirs:—

We wrote you on September 1st, and again on the 13th., re-

questing that you return to us the bills of lading attached to the G\$36,194.80 draft on Clarkson, which matured last April, or remit us the amount of same.

There has been ample time for us to receive acknowledgment of that letter and a statement as to your intentions in the premises.

These documents are obtainable, and we want them, as *as* they were removed inland before Port Arthur was completely invested.

We to-day are in receipt of the following documents which in themselves show that the draft has been paid to your Branch Office. You will note that in the telegram from your Vladivostok office, dated about May 19th., they state "All drafts drawn on Clarkson paid." The draft in question was in the hands of your Port Arthur Office in February and matured in April, so that it must be covered by this particular telegram. We would *requestfully* request that you notify us immediately on receipt of this letter what you propose doing in the premises, and trust you will not, by further delay, compel us to take steps in this country to enforce our rights, which we most certainly shall do.

Very, etc.

R. R. SPENCER.

Shanghai, 19th May, 1904.

Messrs. Clarkson & Co.,

Present.

Dear Sirs:—

We beg to inform you that we have received the following telegram from our Vladivostok Branch.

"Communicate the following to Clarkson Office: to the present date, drafts Centennial Mill drawn on Clarkson Co., Port Arthur, all now paid."

Which please note.

We remain, dear sirs,

Yours faithfully,

BANQUE RUSSO CHINOISE

(Signed)

SPEELMAN.

J. BERGENDAHL,

## U. S. CONSULATE GENERAL.

Shanghai 30/8/1904.

I, the undersigned, Consul General of the United States of America, do hereby certify that the foregoing copy of letter dated May 19, 1904, herto annexed and signed by Russo-Chinese Bank is a true and faithful copy of the original exhibit in this Consulate General, the same having been carefully examined by me, and compared with the said original, and found to agree therewith, word for word and figure for figure.

Given under my hand and Seal of this Consulate General, the day and year above written.

(Signed) JOHN GOODNOW,  
U. S. Consul General.

## THE NATIONAL BANK OF COMMERCE.

Seattle, Wash., Oct. 17, 1904.

The Manager,

Russo-Chinese Bank,

St. Petersburg, Russia.

Dear Sirs:—

I have yours of October 1st, and in reply would say, that the circumstances are entirely against your Institution at Port Arthur.

This draft was drawn December 11th, and should have reached Port Arthur before January 15th. It should have been, and probably was presented for acceptance at that time, or protested for non-acceptance. Notice of protest never reached us. If accepted at that time, it matured ninety days later, or about the middle of April. Port Arthur was not invested on the land side at that time. If the draft was not paid, by all the rules of commercial usage it should have been protested and returned with all documents to this Bank. This was not done, and we leave it to your good selves to explain why.

As your bank was evidently at fault in the premises, we do not feel that because they retained bills which matured in April until July and thereby tied them up, that we should be inconvenienced to the extent we are.

The foregoing questions are clear and we would thank you very much for an explicit and prompt answer. We feel that if

through the fault of your Institution our documents were tied up in Port Arthur, that you should reimburse us, and look to the documents for your payment.

Very etc.,

R. R. SPENCER.

St. Petersburg.

27/9 November, 1904.

The National Bank of Commerce,

Seattle, Wash.

Gentlemen:—

We have received your two favors of the 12th. and 17th. October and, after perusal of contents, we beg to inform you that the information given by our Vladivostok Branch to Messrs. Clarkson & Co., Shanghai, is due to a gross error of our Branch, as the same transmitted that information, on the simple demand of the interested party, Clarkson & Co. without having any proof of the payment of your remittance to Port Arthur.

Of course as the matter now stands, we are unable to discuss the question any further and therefore, hand you enclosed, in cover of the bill for:

U. S. \$36,194.80 claimed by you, cheque on Messrs. Ladenburg Thalmann & Co. New York for

U. S. \$36,013.70 as per note at foot.  
receipt of which kindly acknowledge.

It remains of course however understood that in case your above remittance proves not to have been paid for by Clarkson & Co. you are held responsible to refund the amount of our to-day's cheque.

We beg to add that we have no knowledge of the exact conditions established between you and our Port Arthur Branch for the collection of your documentary bills and shall therefore have to come back upon the matter in case we should learn later on that our calculation is not correct or that we should have deducted other charges.

We are unable to inform at present our Port Arthur Branch of the remittance made by us to you and request you that in case you should sooner or later receive from our Port Arthur



Branch cover for the same remittance, to consider the same as null and void, returning the same to us.

We remain, gentlemen,

Yours truly,

RUSSO CHINESE BANK.

\$36,194.80 less

\$135.73  $3/8\%$  commission.

45.24  $1/8\%$  transfer charges

181.10

.13 postage

---

\$36,013.70

THE NATIONAL BANK OF COMMERCE.

Seattle, Wash., Dec. 5, 1904.

The Manager,

Russo-Chinese Bank,

St. Petersburg, Russia.

I have your favor of November 9th, enclosing draft for G\$36,013.70, which we, of course cannot accept as full payment for the draft.

I enclose you an exact copy of the original draft sent to Port Arthur, which you will note calls for the principal sum of \$36,194.80, with 6% interest to date of return of funds in Seattle; all collection and exchange charges to be paid by drawee.

The draft to this date would amount to G\$38,312.19, leaving a balance due us of G\$2,298.49, which we would respectfully request that you remit us by return mail. We on our part agree upon return to us of both sets of bills, showing that the draft has not been paid, to reimburse you in the sum paid us, provided, that we were in no wise injured by the fact that your Port Arthur Branch has indefinitely held the bills after their maturity, at which time they could have been returned to us and we could have collected from the Steamship Company.

I quote from a letter just received from your Shanghai Office under date of October 3rd, as follows:

"Confirming our respects of the 16th. ultimo, we beg to acknowledge receipt of your favor of the 25th of August, con-

tents of which have our best attention and in reply we beg to state that we are still unable to communicate with our Port Arthur Branch. However, a clerk from that office has recently arrived in Shanghai and he believes that all your bills on Clarkson & Co. were always treated strictly DOCUMENTS AGAINST PAYMENT, and that all bills against goods arrived in Port Arthur were duly paid," which appears to be an additional item of evidence that the draft was paid at maturity.

Very etc.

R. R. SPENCER.

A. L.  
37678.

16/29 December, 1904.

The National Bank of Commerce.

Seattle, (Wash.)

Dear Sirs,

We have duly received your letter of the 5th inst. enclosing for perusal copy of the original draft for G.\$36,194.80 which we return herewith.

We see therefore that all collection and exchanges are to be paid by the drawee as well as 6% interest to date of return of funds in Seattle.

In accordance with your wishes we hand you enclosed in a cheque on Messrs. Ladenburg Thalmann & Co. New York.

\$2,298.49 i.e. \$2,117.39 Interest at 6% on above sum

181.10 charges as per our letter of 27/9 November. It remains understood that in case your above remittance proves not to have been paid, you declare yourselves ready to refund us these \$2,298.49 with the \$36,013.70 sent on 27/9 November, plus accrued interest.

We remain, Dear Sirs,

Yours faithfully,

BANQUE RUSSO-CHINOISE,

(Signed) A. ROSENFELD,

C. BERG.

1 copy of draft.

## NATIONAL BANK OF COMMERCE.

Seattle, Wash., Jan. 17/1905.

The Manager,  
Russo Chinese Bank,  
St. Petersburg, Russia.

Gentlemen:—

On December 5th. we wrote you relative to balance due on Clarkson draft, but so far have not received your favor in answer (it arrived to day) thanks.

We still have in the hands of your Port Arthur Agency draft on Zozounoff and documents, or the proceeds thereof in the sum of G\$270.00 a copy of which is enclosed herein.

Under the terms of this draft payment could or should have been made long before Port Arthur was closed to the outside world, but neither course has been followed, nor have we been able to hear from them on the subject.

We would request that you remit us the present value of this draft G\$287.86 without further delay; also if you have not already done so, that you remit us the balance due on the Clarkson draft.

There were two drafts drawn on Zozounoff, one at a later date than that above mentioned. The goods covered by this draft were diverted by the Japanese Government, and will be settled for by the insurance company. I write this so that you may not be mislead by the statement that goods were diverted. Your prompt and favorable answer to the foregoing is expected.

Very etc.

R. R. SPENCER.

## NATIONAL BANK OF COMMERCE.

January, 18, 1905.

The Manager,  
Russo-Chinese Bank,  
St. Petersburg, Russia.

Dear Sirs:—

We are just in receipt of your favor of December 29th. enclosing draft for G\$2,298.49 for which accept thanks.

We agree that guarantee contained in our letter of December 5th. shall also cover this amount.

Very etc.

R. R. SPENCER.

St. Petersburg.

5/18 February, 1905.

The National Bank of Commerce,  
Seattle, Wash.

Gentlemen:—

We have duly received your letter of the 17th, January.

In reply to your claims regarding Zozounoff for G\$270.—, we beg to inform you that our Port Arthur Branch is closed, that all the staff have left and that all the books appertaining to the Bank have been confiscated by the Japanese. We are now taking the necessary steps to obtain our documents back and shall only be able to give you a reply when they will be returned to us.

We remain, gentlemen,

Yours etc.

R. C. B.

NATIONAL BANK OF COMMERCE.

Seattle, Wash., March 8, 1905.

The Manager,  
Russo Chinese Bank,  
St. Petersburg.

Dear Sir:—

Your favor of the 18th. of February received, contents noted, and in reply would say, that they are not satisfactory.

The draft in question was mailed to your Branch at Port Arthur on the 10th. day of December, 1903, was drawn at 30 d/s and consequently matured in their hands in the ordinary course on or about the 10th day of February, 1904.

They have treated us in this matter as they did in the case of the Clarkson draft, simply retaining documents or the funds, neither of which had they the right to do.

If they neglected the business, or neglected the necessary steps, they are liable therefore, and it is not our intention to wait the result of the war for the payment of this amount.

The draft provided for exchange and collection charges, and for interest at 6% from December 10th, '03 to date of return of funds here. By the time you receive this letter and make returns thereunder, the draft will be worth to us G\$291.50 which amount would request that you remit us without further delay.

You will note that four months elapsed between the maturity of this draft and the investment of Port Arthur on the land side, so that there is no possible excuse for the Port Arthur Office failing to send us results in some form.

Very etc.

R. R. SPENCER.

St. Petersburg

19/1st. April 1905.

The National Bank of Commerce,  
Seattle, Wash.

Gentlemen:—

We are in receipt of your letter of the 8th. March and are sending you accordingly today, under separate registered cover cheque No. 2665 on Messrs. Ladenburg Thalmann & Co., New York, for G\$291.50 (Two hundred & ninety one Dollars 50 cents) as cover on your draft for G\$270.—on G. S. Zozounoff & Co. Port Arthur. Kindly acknowledge receipt of our remittance.

It remains, of course, understood, that in case your above remittance proves not to have been paid for by Messrs. G. S. Zozounoff & Co. you are held responsible to refund us the amount of our to day's cheque.

We must add that we have no knowledge of the exact conditions established between you and our Port Arthur Branch for the collection of your bills and shall *therefor* have to return to the matter in the case we eventually learn that the amount of our remittance is not correct or that we should have deducted charges. As we are unable to inform our Port Arthur Branch re making you, we request you, in case you should receive sooner or *later* from our said Branch cover for the same remittance, to consider same as null and void, and to return it to us.

We remain, etc.

R. C. B.

## NATIONAL BANK OF COMMERCE.

Seattle, Wash., Apr. 17, 1905.

The Manager,  
Russo Chinese Bank,  
St. Petersburg, Russia.

Dear Sir:—

We are in receipt of your favor of 19/1 April 1905 enclosing your draft on New York for G\$291.50 in payment of our bill receivable #1554 for G\$270,—and interest

Very etc.

R. R. SPENCER.

## NATIONAL BANK OF COMMERCE.

Seattle, Wash. April 18, 1905.

The Manager,  
Russo-Chinese Bank,  
St. Petersburg, Russia.

Dear Sirs:—

I am in receipt of your favor of April 1st. enclosing draft for G\$291.50 and carefully note contents of your letter. The remittance you sent us is proper and right under the terms of the draft, and should any of the contingencies arise about which you write, we shall certainly do what is right in the premises.

Thanking you for your attention to this matter, I remain,

Yours etc.

R. R. SPENCER.

St. Petersburg  
The National Bank of Commerce,  
Seattle, Wash.

14/27th June, 1906.

Gentlemen:—

We beg to inform you that a few days ago, we have received back the books and documents of our Port Arthur Branch.

We have, of course, taken up at once, the investigation with regards to your remittances to that Branch, subject matter of much correspondence between us for the last two years, and we have seen from the following that:

Your remittances:



1. \$375—
  2. 375—
- } of 5/1/04 Bordens Cond. Milk Co. on G. S.

Zozounoff, Port Arthur, have been sent to our Shanghai Branch for collection, as you can see from the copy of the letter addressed to you on the 21/4th May, 1904, by our Port Arthur Branch, which we send to you enclosed.

3. \$36,194.80 of 11/12/03 Centennial Mill Co. on Clarkson & Co. P. A. has been returned to you protested, by our Port Arthur branch on the 13/26 May, 1904 (as per copy of the letter enclosed).

4. \$270. of 10/12/03 Armour & Co. on G. S. Zozounoff, P. A.

5. \$1,100. of 31/12/03 Sprague Roller Mills on Clarkson & Co. P. A.

6. \$269.60 of 31/12/03 M. J. Connell on the Officers Economical Society P. A.

7. \$23,468.40 of 2/1/04 Centennial Mills Co. on Clarkson & Co. P. A. have been returned to you protested, by our Port Arthur Branch on the 7/20th June as per copy of letter enclosed.

8. \$1,100. of 1/12/03 Sprague Roller Mills on Clarkson & Co. P. A. has been paid and proceeds remitted to you by our Port Arthur Branch on the 19/2nd. May, 1904.

9. \$4,136. of 6/10/03 Centennial Mills Co. on Clarkson & Co. P. A.

10. \$16,155.20 of 26/10/03 Centennial Mill Co. on Clarkson & Co. have been paid and proceeds remitted to you by our Port Arthur Branch on the 17/30th April, 1904.

11. \$270. of 25/1/04 Armour & Co. on G. S. Zozounoff, Port Arthur. From the books of our Port Arthur Branch it appears that the First of Exchange has not been received there, but only the Second with the duplicates of Bill of Lading, Invoice and Insurance Policy which documents we hand over to our San Francisco Branch together with the other documents, mentioned further, to be returned to you after payment of our claim.

As to your remittance of

12. \$283.10 of 3/2/04 Armour & Co. on Peteritz Brothers,

Port Arthur, mentioned in your letter of the 21st April, 1904, we beg to say that no trace of the same can be found in the books of our Port Arthur Branch neither can it be found amongst the documents of that Branch.

The first of Exchange for \$270.—and the latter remittance may have been intercepted by the Japanese authorities or lost on the way, but no entry is to be found on the Branch's books.

As you see from the above, the bills for which we have sent you cover, viz: \$36,194.80 & \$270.—, by our letters to you of the 27/9th November, 16/29th December, 1904, and 19/1st April, 1905, have not been met at all, were duly protested and returned to you. The return has been effected in the usual way, by registered cover, but as the Japanese authorities have intercepted all the mail they found in the Post Office at Port Arthur at the time of surrender, it may happen that you have not received same yet.

As the case now stands, we beg you to refund us:

1. \$36,113.70 plus \$2,298.49 plus 6% interest on these sums from dates of our remittances to the date of your remittance to us; this in connection with the bill for \$36,194.80.

2. \$291.50 plus 6% interest as stated above; this in connection with the bill for \$270.—

3. Rs.566.26 according to Port Arthur's letter of the 13/26th May, 1904, plus 6% interest, from that date to the date of your remittance &

4. Rs. 410.04 according to Port Arthur's letter of the 7/20 June, 1904, plus interest from that date to date of your remittance.

—and request you to kindly remit the above sums to our Branch in San Francisco for account of our Port Arthur Branch.

All the duplicate documents relating to above transactions and all those "Seconds" which we have had returned by the Japanese authorities are being forwarded by us to our San Francisco Branch with instructions to hand over to you, on receipt of the above mentioned sums.

We are sending to the above Branch a copy of the present letter and remain, gentlemen,

Yours truly,

R. C. B.

## NATIONAL BANK OF COMMERCE.

Seattle Wash., July 13th, 1906.

The Manager,  
Russo-Chinese Bank,  
St. Petersburg, Russia.

Dear Sirs:—

I am just in receipt of your favor of June 27th. But am not prepared to answer in detail in regard to same.

We should not be willing to accept the statements or books of your Port Arthur Branch, as evidence of anything having been done, as they were so notoriously lax in their business methods that it was almost impossible to keep anything straight or business like when entrusted to them.

I, however, note that the draft of Clarkson of thirty-six thousand odd was protested on the 26th of May. This was about three months after it should have been protested, or accepted. The draft was never returned to us, nor was its receipt, so far as I can now ascertain even acknowledged.

We have the statement of your Shanghai Office that this draft was paid. We also have other evidence that it was paid several days before its proper maturity.

We expect to do whatever is equitable in the Premises, but the equities must be clearly defined and proven before we feel prepared to make a refund.

As your office is fully aware, to my certain knowledge, of the conditions existing there, I think you will agree with me that my position is well taken.

Yours etc.

R. R. SPENCER.

21/3, August, 1906.

## NATIONAL BANK OF COMMERCE.

Seattle, Wash., August 4th, 1906.

The Manager,  
Russo-Chinese Bank,  
St. Petersburg, Russia.

Gentlemen:—

Enclosed I hand you copy of a letter written to your San Francisco Office, having particular reference to a collection

they claim to hold against this Bank sent them by you, and more particularly referred to in your letter of June 27th inst., and this letter is final so far as this Bank is concerned.

We trust you will be able to get the affairs of your Port Arthur Office sufficiently straightened out to reasonably account for the treatment of the draft on the Economical Ass'n of the Military and Police, no part of which transaction has ever been completed on the part of your office, although they had ample time prior to the investment of Port Arthur by land.

Respectfully, etc.

R. R. SPENCER.

Seattle, Wash., August 4th, 1906.

The Manager,

Russo-Chinese Bank,

San Francisco, Cal.

Dear Sir:—

I have your favor of the 17th ultimo, also the later one referring to the same subject, under date of July 30th.

We have been investigating the subject matter of the first letter and find that your St. Petersburg office is claiming the reimbursement on two drafts; one for \$36,194.80, Centennial Mill Company on Clarkson & Company, Port Arthur; one for \$270.—Armour & Company on Zozounoff, also at Port Arthur.

I have examined the documents sent by you to the Puget Sound National Bank, and find that in the case of the Clarkson draft you have returned invoice, bills of lading and insurance policies, and claim to have returned the drafts upon the 26th day of May, 1904.

There are many things that are irregular and peculiar to this particular transaction. In the first place, we have a letter over Mr. Clarkson's own signature, dated May 10th, 1904, in which the following statement occurs:

"In regard to our drafts will say, that we have paid every one of your drafts (Centennial Mill Co.) promptly; in fact the last one calling for some Roubles 74,000.—flour ex Hyades was paid some six days before it came due.

At our request the Russo Chinese Bank here telegraphed to their Branch in Port Arthur, asking for certain information

on various subjects (private firms at that time being unable to send telegrams) and among other things, the Port Arthur Branch notified the Bank here (at Vladivostok) that they had received the money on our account and had applied it to take up your (Centennial Mill Co.'s) draft for the 'Hyades' flour."

We have also investigated this matter through other channels, and before making a formal demand on St. Petersburg for the payment to us of the sum in question, satisfied ourselves that your Port Arthur Office had received the money for the flour but had possibly not applied it where it belonged.

There are several things in the transaction which strike us, to say the least, as extremely peculiar.

The draft left here in December, arrived in Port Arthur in January of 1904, and should have matured, in the ordinary course of business about the middle of April of that year, at which time it should have been protested if not paid, and returned to us, with all documents, as there was no obstruction to the mails by land then existing. They do not claim, however, to have protested and returned the drafts until thirty days later, which drafts never come to hand (also a peculiar circumstance), and strangest of all, they failed to follow the usual commercial usage of returning the documents with the protested draft, an omission that can scarcely be accounted for.

Among other papers sent to the Puget Sound National Bank were all the documents pertaining to a number of drafts which were paid and remitted for by your Port Arthur Office.

This shows the irregular method of doing business. As I explained to your Mr. Allen long ago and before any claim had been made against us in regard to these two drafts, the irregularities practiced at both your Port Arthur and Vladivostok Offices were such that we would not do any further business with them, except where positively instructed by drawers of drafts, and then only under their guarantee to assume all liability of loss.

Your Port Arthur Office still has in its possession a draft for \$269.60 sent them some time in December, 1903, for which

they have never accounted in any way, shape or form. This should have been protested and returned about March 1st.

Under a copy of a letter enclosed us purporting to have been written by them June 20th, 1904, they mention four drafts which they claim were protested, among them this particular one, but say they retain documents pending instructions. We cannot see why they should hold a thirty days' sight draft received by them in January (which matured the fore part of March) without protesting until June, when all means of communicating with the outside world were cut off.

Under the circumstances we cannot see our way clear to paying the claims made by your St. Petersburg office, and unless they satisfactorily account for the drafts and documents in the case last above mentioned, we shall certainly commence suit to recover the amount.

Very Respectfully, etc.

R. R. SPENCER.

NATIONAL BANK OF COMMERCE

Seattle, Wash. August 20, 1906

The Manager,  
Russo-Chinese Bank,  
St. Petersburg.

Dear Sirs:—

I am in receipt of your favor of August 3rd., the contents of which have been carefully noted. I will premise what I am about to write with the statement that we are disposed to be perfectly fair in the premises, but our experience in the past with the business methods of both your Port Arthur and Vladivostok Agencies have been such that we will take their statements with a very large grain of allowances where it will be to their interests to withhold any part or the whole of any transaction.

We have absolute proof that this flour was actually handled by your own officials who received the process therefor.

There are some statements in your letter which do not appear on the face of them to be reasonable ones. In explanation of their conduct in connection with the \$36,000.— draft, you say, that the draft was protested and returned by your Branch



on May 4th, 1904, on the same day that the besieging Japanese army closed your communication by sea and land. This is the reason given for the bills not being returned to us at that time. On May 26th, when the investment of Port Arthur had become even more stringent, they claim to have mailed the protested drafts. This does not look reasonable to us. It is also commercially the custom to advise the dishonor of drafts of that size, and even much smaller, by cable or wire. This means of communication was still open to them in May. I wired you immediately on receipt of your letter as follows: "disagree am investigating further," and now confirm. I am giving the matter the fullest investigation which from the distance involved will take some time.

I note that you say that you "can find no fault with our Port Arthur people in the given instance." It is possible that you may be satisfied with much less than would satisfy us on this side, or it is possible that you refer particularly to this instance as to being satisfied with their methods.

The writer has been authoritatively advised that some time before the opening of the war, your Port Arthur Office was investigated by an official of rather high rank, with unfortunate findings on his part.

Mr. Clarkson was not in Port Arthur at the time this flour was sold. That the flour was disposed of is not questioned and that the proceeds were paid in and handled by your bank has been authoritatively cleared. If the proceeds have been credited by your Branch on debts other than the bill then in their possession for collection, you certainly are not entitled to recover it from us.

Very sincerely yours,

R. R. SPENCER.

St. Petersburg  
The Manager,

8/21st. August 1906

National Bank of Commerce,  
Seattle, Wash.

Gentlemen:—

We have just received your telegram of 8/21st inst.

"disagree investigating further"

and await with interest the results of your investigations,

which will, we are sure, prove the correctness of the Statements contained in our letter of the 3d inst., and will induce you to give the matter an early settlement.

We remain, dear sir,

Yours faithfully,  
RUSSO CHINESE BANK

St. Petersburg

7/20th September 1906

The Manager,

The National Bank of Commerce,  
Seattle.

Dear Sirs:—

We are in possession of your favor of the 20th ult. and abstain from discussing your unnecessary and quite useless remarks about the business methods of our Branches etc., etc.

The fact that we are returning to you the whole set of shipping documents, which were attached to the bills in question, is for itself proof enough that said bills have never been paid, and by what means "it has been authoritatively cleared" that the proceeds were paid in and "handled by our Branch" remains your secret.

In order to settle this matter one way or the other, we once more refer you to the conditions under which we transferred you the amount of the bills in question (see our letters of 27/9th. Nov. and 16/29th. December 1904 and 1st April, 1905) and request you to refund the money plus accrued interest to our San Francisco Branch.

I, on the 12/25th October, we are not in possession of a cable of our said Branch advising us your payment, we shall be obliged to take immediately the necessary legal steps to recover our money.

Yours truly,

R. C. B.

NATIONAL BANK OF COMMERCE

Seattle, Wash. October 8th 1906

The Manager,

Russo-Chinese Bank,

St. Petersburg, Russia.

Dear Sirs:—

I have your favor of September 20th. contents noted with interest. I note that you say that the fact that "The whole set of shipping documents which were attached to the bills in question is for itself proof enough that said bills have never been paid." From their method of handling bills in Port Arthur, it would appear that this is not a fact and that they returned to us all of the documents on one or more bills which were paid, and paid through them. This of itself would have a tendency to disprove the conclusions you arrive at.

As to the legal actions you contemplate taking, you of course are at liberty to take such steps as best subserve your interests.

We shall shortly be in possession of all the obtainable facts in the case and will then take such action as equity seems to warrant.

Very, etc.

R. R. SPENCER

Jan. 24, '07.

The Manager,  
Russo-Chinese Bank,  
St. Petersburg, Russia.

Dear Sir,—

Some time since we received a letter from you, stating that unless a deposit was made with your San Francisco Office of a certain amount, that you would commence suit against this Bank.

We have since been the means of sending a man to Vladivostok to investigate the conditions, and as a result of his findings, cannot feel otherwise than that we are still in the right.

Mr. Clarkson insists that he has never been able to get a statement of his account up to three months ago, and that the Bank has refused or failed to give him any satisfaction to his demands for an accounting.

We wish this matter settled, and would request that you ascertain, if you have not already done so, by direct information from Port Arthur as to what has been done, and then advise us of your intention.

As before advised, we stand ready to carry into effect the equities in the case, but so far as we are now able to determine, they are in our favor, and until proved otherwise, we would not care to alter present conditions.

An early answer will be greatly appreciated by,  
Yours very sincerely,

M A K  
A. L.

31/13 February 1907

The Manager National Bank of Commerce  
Seattle, Wash.

Dear Sir:—

We are in possession of your favor dated January 24 inst., and beg to advise you in answer that the informations your man received in Vladivostok are erroneous; we supplied Mr. Clarkson with an extract of his account from our Port Arthur books as soon as we got them back from the Japanese i. e. and of July, 1906.

As is clearly shown by our Port Arthur books and that above mentioned extract, the bill in question has never been paid by Clarkson & Co. and our previous detailed correspondence should have been proof enough to you that our Bank is quite in its right.

The whole affair is now in the hands of our San Francisco Branch with which please settle the matter direct.

We are, Dear Sirs,

Yours faithfully,  
BANQUE RUSSO-CHINOISE.

THE NATIONAL BANK OF COMMERCE, SEATTLE  
March 8th, 1907.

The Manager,  
Russo-Chinese Bank,  
St. Petersburg, Russia.

Dear Sirs:

The writer will leave in about ten days for Japan and from there intends going to Vladivostok, where I will be very glad to meet your representative in conjunction with Mr.

Clarkson and try and get at the true inwardness of the transaction about which there seems to be so much question.

Should you desire to communication with me there, address, "c/o Kunst & Albers."

Very respectfully,  
R. R. SPENCER, V. P.

M A K  
COMMERCE SEATTLE  
coplazinha acanaceo Vladivostok  
SINORUSSE.

12/25 Mars 1907.

COMMERCE SEATTLE 12/25/III 07

coplazinha Refer to your letter of 8th.  
acanaceo telegraph probable date of arrival at  
Vladivostok Vladivostok

SINORUSSE.

Thereupon the plaintiff read in evidence the deposition of David M. Clarkson, taken and certified before the Honorable Lester Maynard, United States Consul at Vladivostok, Siberia, and certified by him in his official capacity. The deposition of DAVID M. CLARKSON, a witness on behalf of the plaintiff, was as follows:

My name is David M. Clarkson, age forty-eight years, residence Vladivostok. Present occupation, merchant.

During the years 1903, 1904 and 1905, I resided in Vladivostok. Was engaged in the general import, export, shipping and mining business in Russia, China and Manchuria, with various offices, and headquarters in Vladivostok.

In Shanghai I had an office doing business on its own account, but simply acting as a purchasing agent for the Vladivostok and Port Arthur offices.

In Port Arthur I was doing a general importing shipping and contracting business.

In Vladivostok the same as in Port Arthur with the addition of mining and various industrial enterprises.

The Shanghai office was opened two years before the Russo-Japanese war and was practically closed when the war broke out. The Port Arthur Office was opened in the fall of 1898

and continued unto the outbreak of the war when it was practically closed. The Vladivostok office was opened in the spring of 1898 and still continues.

The business in Shanghai and Port Arthur was carried on under the name of Clarkson & Co., I having a partner by the name of Julius F. Lindquist, he having however, a very small and unimportant interest, simply enough to allow me to register the company as a company under the Russian law.

In Port Arthur I did a general import and export business, also a shipping business, acting as agent for various steamship lines, agent of various insurance companies and a stevedoring department. Also erected a steam brick factory and artesian well boring outfit. In connection with the shipping and stevedoring department there we had warehouses in which we carried goods for other parties as well as our own.

This business, as already stated, was carried on under the name of Clarkson & Co. and in the following way: When a steamer was unloaded by ourselves, boat notes were given to the steamer, and the goods held at the warehouse until parties presented the bills of lading when the goods were turned over to them after all charges to date had been paid. When a steamer was unloaded by other parties but the goods were put in our warehouses, the warehouse foreman gave receipts for the goods as delivered in the warehouse and were then turned over to the owners on presentation of the bills of lading.

The business included acting as agents for the steamers plying to that port. In the later part of 1903 and in the early part of 1904 I had the agency of the Boston Steamship Co. and the Boston Towboat Co. in Port Arthur. As far as the details of how they were handled, I only know of it in a general way, as the management was entirely in the hands of my local managers.

During 1903 I was so occupied with my business in Vladivostok that I had no time to spare to go to Port Arthur, except on very short trips and these trips were far between. Consequently, to a great extent, I left everything there to the local managers and knew little or nothing about the details.

I was the head of the firm and Mr. Lindquist had a small interest.



The managers of the company at Port Arthur in 1903 were Mr. W. S. Davidson and Mr. A. T. Short. The latter was let out of the firm the latter part of 1903, and very early in 1904 Mr. Davidson was discharged. For a short while between the discharge of Mr. Davidson and the outbreak of the war I had as manager Mr. S. J. Czechowicz. At the outbreak all of my staff was ordered out of the town by General Steosell, the Commander at Port Arthur.

During 1903 and the first days of 1904 Clarkson & Co. had dealings with the Centennial Mill Co. which consisted of buying flour from the mill company. Shipments of flour were purchased.

I knew very little about the shipment of flour made by the Centennial Mill Co. on board the steamship "Hyades" about December 10th. I simply knew that the shipment had been made, but of the quantity I had no exact knowledge. Nor do I know the date of the arrival of the "Hyades" at Port Arthur.

All shipments of flour from the Centennial Mill Co. to Clarkson & Co. were straight sales, not on consignment, with the exception of one or two small and unimportant shipments.

I cannot state definitely what was done with the "Hyades" flour on its arrival in Port Arthur, as all the books, and documents pertaining to the Port Arthur office were lost during the siege of Port Arthur and as I was not posted as to the details of the running of the office in the latter part of 1903 and beginning of 1904. But I suppose that any shipment that arrived before the outbreak of the war was handled in the same way as previous shipments. To the best of my knowledge and belief the "Hyades" shipment would have been unloaded same as previous shipments that is, either stored in our warehouse or on the foreshore. I cannot tell how the unloading came about as I have no details.

I cannot state what became of the "Hyades" flour but suppose it was added to the other stock of flour that we had on hand as we always carried a very large stock.

I do not know what became of the flour or whether the flour was sold or not.

I do not know what the particular agreement was as to the time of payment for the "Hyades" flour, but the general ar-

rangement was for a three months draft attached to bills of lading, delivery of documents against payment.

Interrogatory 27. Where Clarkson & Co. were the consignees of Centennial flour, and it was discharged by the ship into the "go-down" or warehouse of Clarkson & Co. at Port Arthur, and the method of payment was by draft of the Centennial Mill Co. upon Clarkson & Co. at Port Arthur, *will* bill of lading attached, payable at thirty sixty or ninety days after acceptances, was there any custom or practice at Port Arthur that the Bank or person holding the draft after acceptance and until the time of payment had or retained any control over the flour in the "go-down" or warehouse, and if so, what was the custom?

Answer: Our custom was that the goods should be turned over only on presentation of the documents, but in this connection will say that goods were often given out by other shipping agents against a letter of guarantee of the receiver of the goods, that he should present the bill of lading later on, the excuse being generally that the consignee had not received the documents. While this was often done by other people I strongly objected and many times told my managers to not deliver the goods without the bill of lading. To be sure that there would be no mistake I wrote them a letter from Vladivostok which I herewith submit in evidence. Press copy-book, page 598, dated Vladivostok July 18/31, 1903, general number 12016, Letter No. 878. Messrs. Clarkson & Company, Port Arthur. Dear Sirs: "The writer met one of the smaller class of merchants of Port Arthur a few days ago, and he happened to mention that he had obtained a small shipment of goods from you on his personal letter of guarantee, the B/L not having arrived at the same time as the goods. We want to once more call your attention to the writer's unwillingness to assume the responsibility that results from giving up goods without the Bs/L, or a guarantee backed by the Bank. The last time Mr. Clarkson was in Port Arthur he spoke to you about this matter, and your reply was that it was not always possible to refuse such a request without it causing unpleasantness and loss of business, but will say we would rather lose business than run such risks. Mr. Davidson and Mr.

Short both mentioned the fact that as Kunst & Albers gave them goods on the firm's letters of guarantee without the Bank's endorsement, they considered they must do the same when asked by Kunst & Albers. We would much prefer that you make it a point to get your guarantees endorsed by the Bank, and then you can ask Kunst & Albers to do the same. You cannot be too careful in this matter, and in the case of our own goods coming on steamers addressed to ourselves, don't touch the goods without some arrangement having been made with the Bank in regard to the documents. As the writer went into this so fully in person, we would not have referred to the matter again if he had not met the Port Arthur merchant. We will ask you to follow our wishes in this matter to the letter. We are, Dear Sirs, Yours faithfully, (signed) Clarkson & Co." I also submit a certificate from the American Consul, marked Exhibit "A" that this letter appears on pages numbered 598 and 599 in my press copy-book of letters sent to the Port Arthur Office.

Clarkson & Co. always either paid the drafts before taking delivery of the flour as merchants or else made arrangements with the bank by which the bank would turn over the documents to us.

As to this particular shipment, I do not know, but suppose it was handled as former shipments.

I do not know anything about the draft of the Centennial Mill Co. upon Clarkson & Co. about December 11th, 1903, as I was not in Port Arthur and the details were not sent to me.

I do not know whether such a draft was presented or before whom, or whether it was accepted or not.

All my books, documents and records belonging to Port Arthur were lost during the siege, with the exception of a few unimportant ones, which do not in any way refer to the shipment.

I do not know whether any part of the proceeds of the sale of "Hyades" flour was devoted to the payment of the said draft.

I believe that a certain amount of the whole stock was sold a day or two before the war broke out. Any such proceeds must have been deposited in the Russo-Chinese Bank, as there

was no other place for the money to be put. Whether it was appiled on the draft or not, of course, I cannot tell. Having no records I do not know whether the draft was paid or not. But from indirect information which I received during the first month or two after the war broke out, I supposed at that time that the draft had been paid.

At various times in 1904 and 1905, I stated to persons interested that said draft had been paid at maturity, or words to that effect, based on the information I had received during the first two months after the outbreak of the war.

Interrogatory 43. Did you intend to deceive any person by such statements, if you made any?

Answer: I certainly had no intention to deceive anybody, and herewith is a copy of a telegram sent to Mr. Epstein in St. Petersburg. Mr. Epstein at that time was the head manager of the Vladivostok branch of the Russo-Chinese Bank, and had gone on to St. Petersburg to consult with the board of the Russo-Chinese Bank. At the outbreak of the war, when my people were driven out of Port Arthur, no private people of firms were allowed to send telegrams to Port Arthur, so I asked the managers of the Russo-Chinese Bank in Vladivostok to send certain telegrams for me through their office in Port Arthur. When Mr. Czechowicz was driven out of Port Arthur, he was here for a few days, and I asked him if there were any unpaid drafts in Port Arthur, and he told me that there were none, all having been paid up to date. Indirectly I heard that some goods, among which was a certain amount of flour, had been sold by my former manager, Mr. Davidson, to M. Ginsburg & Company. At the time this sale was made Mr. Davidson was no longer in my employ, having been discharged some days previously. He, however, took advantage of the confusion in Port Arthur to make this sale. Thinking that there was a certain amount of money that would be to my credit in the Port Arthur branch of the Russo-Chinese Bank, I asked the managers to telegraph to their managers in Port Arthur to remit any balance to my credit to the bank here. The reply from the Port Arthur bank was that they were holding money of mine to pay certain drafts that were about due. At my request the bank here once more telegraphed to the Port

Arthur bank and told them to send forward all drafts that they might hold against Clarkson & Company to the Bank here, and also any money that Clarkson & Company had on deposit; the idea being to pay up these drafts in Vladivostok, as at that time my office in Port Arthur was completely deserted. After a few days the reply came back saying that the money that I had on deposit had been used in paying up a draft from the Centennial Mill Company. For future evidence I wanted to get copies of all these telegrams but I could never get them from the bank. As Mr. Czechowicz had told me that all drafts up to date had been paid, and had mentioned that there was one draft that was about due from the Centennial Mill Company, and as the Port Arthur bank had held back money of mine against the payment of such draft, I naturally took it for granted that any draft from the Centennial Mill Company had been paid up. I tried to get full particulars from Mr. Czechowicz, but he was so badly frightened that he had only an indistinct idea of what really had happened in Port Arthur and could give me no such details as I required. He was here but a few days, and then left for America.

The translation of the telegram referred to in the beginning of this answer is as follows:

"St. Petersburg, Sergei-efaskaia 38, Stephan Lwovitch Epstein. I confirm that telegram of Vladivostok Branch to Shanghai Branch was sent at my request, but still think that Port Arthur branch kept back money to pay the draft let St. Petersburg send Port Arthur account so that I can make out how the business actually stands Clarkson, October 27th, 1906."

I am unable, up to the present time, to say whether I was mistaken in my statement that the draft had been paid, or not.

Interrogatory 47. State if you knew what were the political conditions at and in the neighborhood of Port Arthur during the year 1904, both on the land and on the sea.

Answer: During the year 1904 war was going on between Russia and Japan, and the Japanese fleet in front of Port Arthur kept the Russian fleet hemmed in the harbour, and on land the Japanese army had Port Arthur shut in and



besieged, as a result of which no communication could be had with Port Arthur whatever for private parties. All Americans and Englishmen were driven out of Port Arthur at the beginning of hostilities, and the only communication with the outside world was by occasional dispatches that the Russian Government managed to get through the lines with torpedo boats. This means of communication of course was of absolutely no benefit to merchants, and as a result I know practically nothing of what was going on.

The war put a full stop to all outside communication with the world either telegraphic or by post with the exception of an occasional Russian torpedo boat that managed to run the blockade and deliver despatches to Chefoo. All mail communication was cut off between Port Arthur and the outside world after the taking of Dalny by the Japanese and stayed cut off until the end of the war.

Port Arthur was besieged by the Japanese and captured by them in the latter part of the year 1904 and the beginning of 1905.

To the best of my knowledge and belief Clarkson & Co. owed nothing to the Russo-Chinese Bank at Port Arthur during the months of April and May, 1904.

Mr. Ofsiankin was the manager of the Port Arthur Branch of the Russo-Chinese Bank in April and May, 1904.

To the best of my knowledge, Clarkson & Co. did not give any instructions written or oral to the Russo-Chinese Bank at Port Arthur or to its managers or either of them, to pay any sum on account of the Centennial Mill Company's draft on Clarkson & Co. for \$36,194.80 for the "Hyades" flour.

### CROSS-EXAMINATION.

At this time the firm of Clarkson & Co. is indebted to the Russo-Chinese Bank for the sum of 231,000 roubles.

The company never owed the Shanghai Branch of the Russo-Chinese Bank any money whatever.

The amount that was owing to the Port Arthur Branch was a matter of dispute after the war. Clarkson & Co. claimed that they owed nothing and that the total debt of Clarkson & Co. was owed by them to the Vladivostok Branch. The



amount that was owing was a matter of dispute for almost two years, commencing in October, 1906. Clarkson & Co. claimed the bank owed them over a half million roubles and the bank claimed that Clarkson & Co. owed them over 900,000 roubles. It was finally settled in May, 1908, by a compromise by Clarkson & Co. acknowledging a debt of 231,000 roubles.

I know the firm of Ginsburg & Co. of Port Arthur and vicinity.

Early in the year of 1904 Ginsburg & Co. obtained possession of a certain amount of flour from Clarkson & Co. at Port Arthur, but whether it was the "Hyades" flour or not I do not know. They bought the flour from Mr. Davidson after his dismissal by me. They purchased it from Mr. Davidson as the supposed representative of Clarkson & Co. It was not Clarkson & Co. who made the sale.

Cross-interrogatory No. 22. Was the sale made to Ginsburg & Company by W. S. Davidson, acting for Clarkson & Company? If so, state what was the purchase price of the flour? Did it not amount to the sum of about 67,000 roubles, and did not you complain to the Russo-Chinese Bank at Port Arthur that Davidson had agreed to sell the flour to Ginsburg & Company for less than it was worth by at least one rouble per sack?

Answer: The sale was made by W. S. Davidson, but after his dismissal from Clarkson & Company.

W. S. Davidson was not acting for Clarkson & Company when he sold the flour to Ginsburg & Company. The flour was sold at two different prices, one bill was made out at Rbls. 2.00 a sack, and one bill was made out at Rbls. 2.40 a sack. The exact amount of flour sold by W. S. Davidson to Ginsburg & Company I do not know, nor do I know the amount that it brought.

On account of the inability of Vladivostok merchants to send and receive telegrams from Port Arthur, I only heard of certain transactions some little time after they had happened. This information being derived through the aid given me by the Russo-Chinese Bank in Vladivostok, who were allowed to send telegrams to and from Port Arthur strictly on the bank's business. The first I heard was that the flour had

been sold at Two roubles a sack. I firmly believe at that time, that as war had broken out, the flour that was in Port Arthur at the time was worth fully Rbls. 3.00 a sack, consequently I considered that any sale made at Rbls. 2. was at least One rouble below the market value. To the best of my knowledge and belief the selling price before hostilities commenced was from Rbls. 2.50 to Rbls. 2.60 a sack. It was only sometime afterwards that I heard that W. S. Davidson had made out the two sets of bills to Ginsburg & Company, and that the difference between Rbls. 2.00 and Rbls. 2.40 a sack had been turned over to him by Ginsburg & Company. He received some cash and the balance by a draft on Shanghai. I heard of this draft on Shanghai, and the Russo-Chinese Bank of Vladivostok instructed the bank in Port Arthur to wire to Shanghai and stop the payment of it. This they succeeded in doing, and Ginsburg & Company paid the amount of the draft into the Russo-Chinese Bank at Port Arthur.

Cross-interrogatory No. 23. Did not the Russo-Chinese Bank, acting under your instructions, refuse to permit Ginsburg & Company to take the flour at the price agreed upon between Ginsburg and Davidson, and did not Ginsburg agree with the bank to pay an additional sum for the flour in order to get it?

Answer: Acting under instructions from me, the bank in Port Arthur refused to let Ginsburg & Company have the flour at Rbls. 2.00, whereupon Ginsburg & Company agreed to pay Rbls. 2.40.

We gave no instructions regarding the sale of flour to Ginsburg & Company direct to the Russo-Chinese Bank in Port Arthur because we could not communicate with them. All instructions were given to the bank at Vladivostok with a request to forward. Almost all these requests on our part were verbal.

Deposition of Anatoly Vladimirovich Vinberg, for Plaintiff.

Thereupon the plaintiff read in evidence the deposition of Anatoly Vladimirovich Vinberg, taken and certified before the Honorable James W. Ragsdale, United States Consul at St. Petersburg, Russia, and certified by him in his official ca-

capacity. The deposition of ANATOLY VLADIMIROVICH VINBERG, a witness on behalf of the plaintiff, was as follows:

My name is Anatoly Vladimirovich Vinberg. I am sworn attorney at law, of the St. Petersburg District Court, residing at St. Petersburg. Am 37 years old. I have been practicing as attorney at law for eleven years, during which I have carried on legal civil suits in the courts of the Empire.

In 1904 there was in force the "statute on bills of exchange" sanctioned by his Imperial Majesty on May 27, 1902, published in No. 62 of the laws and orders of the Government (Sec. 622). The statute on bills of exchange, after having been examined by the State Council and sanctioned by His Imperial Majesty, was put in force throughout the country since January 1st, 1903.

The statute on bills of exchange was in force throughout the Quanton Region and particularly in Port Arthur.

I append hereto an official copy on the statute of bills of exchange in the Russian language. Owing to the lack of sufficient knowledge of the English language, I am unable to present a translation of the same which would be exact for the American Court to pronounce a judgment in virtue thereof.

Testimony of S. T. Steparnov, for Plaintiff.

S. T. STEPARNOV was called and sworn as a witness on behalf of the plaintiff as a translator and testified as follows:

I am familiar with the Russian and English language.

Turning to subdivision 41 of the pamphlet attached to the deposition of A. V. Vinberg entitled "A copy of the Laws of the Russian Empire, Volume 11, Part second, Statute on Bills of Exchange for Commercial purposes" and read and translated paragraph 41, subdivision 41, as follows:

"A bill of exchange due at a certain date, or at such a time from the date of it, or at such a time from presentation is to be presented for payment at the due date or at one of the following two days if not holiday or Sundays."

DEPOSITION OF CHARLES RICHTER, ON BEHALF OF PLAINTIFF.

Thereupon the plaintiff read in evidence the deposition of Charles Richter, taken and certified before the Honorable Lester

Maynard, United States Consul at Vladivostok, Siberia, and certified by him in his official capacity. The deposition of CHARLES RICHTER, a witness on behalf of the plaintiff, was as follows:

My name is Charles Richter, I am thirty-five years of age, reside at present in Harbin. I am director of the Russo-Chinese Bank at Harbin.

From January 1st, 1904, until the end of 1904, I resided at Port Arthur. From January 1st until April 14th, submanager of Kunst & Albers, Port Arthur; from April 14 to August 2d, Manager of Kondakoff & Souvoroff. And from August 2d was attorney of the Russo-Chinese Bank at Port Arthur.

I was one of the three managers. I had to keep one of the books, the register of accepted checks issued by the bank. I had to look over the books on several occasions and also to make entries. The bank kept books in order and entries were made in the daily journal involving the collection of drafts and all moneys collected for third parties were entered in the cash-book.

At the capture of Port Arthur the books, papers and effects of the Russo-Chinese Bank were all arrested by the Japanese and were retained by them until about April, 1906. While the books, papers and effects were in the possession of the Japanese military forces, the bank had no access to them. They are now at the head office of the bank.

There was a law in Port Arthur in 1904 to allow two days of grace on bills of exchange.

Interrogatory 33. State any other matter or thing within your knowledge material to the action of the plaintiff herein against the defendant herein, as fully as though you had been particularly interrogated hereon.

Answer: As far as I know Clarkson is stating to have paid the draft for \$36,194.80, but I know for a fact that such draft has not been paid by Clarkson; that it was protested, and the bill and protest sent to the National Bank of Commerce of Seattle, but has gone astray in consequence of the war.

## CROSS-EXAMINATION

I am still employed by the Russo-Chinese Bank.

The books of the late Port Arthur bank are now at the office of the bank at St. Petersburg. They are not at Vladivostok at present. I have no access to them, and they are not under my control.

The correspondence between Clarkson & Co. or Clarkson and the Port Arthur branch is now in the head office of the bank at St. Petersburg. It is not in my possession or under my control. I have some uncertified extracts of it.

During 1903 and part of 1904 managers were: A. W. Ovsiankin, now manager of the Vladivostok branch of the Russo-Chinese Bank, and A. E. Dmitrieff-Mamonoff, who left the services of the bank in 1905 and whose present residence is unknown to me, and officers were Mr. Alexander Friedberg, now in St. Petersburg at the head office of the bank, and Mr. S. A. Pavloff, now at the bank's services in Vladivostok. Messrs. Ovsiankin, Friedberg and Pavloff left Port Arthur on the 20th July—2d August, 1904, during the siege. Mr. Mamonoff remained in Port Arthur and I was transferred on the said date from Suvoroff & Kondakoff's office to the bank as submanager. From 1st of December, 1903, until 20th July 2d August, 1904, the officers in charge were Messrs. Ovsiankin, Friedberg and Pavloff and partly Mr. Dmitrieff-Mamonoff, whose arrival was unexpected a few days prior to Port Arthur being cut off by the Japanese; it was his intention to return to Moukden, where he was in charge of the Russo-Chinese Bank, but that was impossible. From the 20th July 2d August, to the closing of the Port Arthur branch the business was carried on by Mr. Mamonoff and myself.

I was not familiar with the go-downs of Clarkson & Co. at Port Arthur. I was there once or twice, it must have been in the beginning of 1904 prior to my entering the bank's service. When visiting the go-downs I saw a lot of flour, but I could not state the quantities.

Hostilities between Russia and Japan commenced on the 26th January/8th February, 1904, and Port Arthur was captured on the 20th of December, 1904 2d January, 1905.



MR. GREGORY: These are all the depositions that we have. May it please the court, it may be stipulated between the parties that the steamship "Hyades" arrived at Port Arthur on January 16, 1904, and that she left Port Arthur for her homeward voyage on January 22nd, 1904.

It may be also stipulated that the log book of the steamship "Pleiades" will show that she arrived at Port Arthur on February 7, 1904, and that she left Port Arthur for her homeward voyage on February 13, 1904.

R. R. Spencer, a witness produced by the plaintiff to maintain the issues on its behalf, being sworn, testified as follows:

In the years 1903-4-5 and 6 I was cashier and vice-president of the defendant bank, National Bank of Commerce, of Seattle, and as such had charge of the correspondence with the Russo-Chinese Bank of Port Arthur. I recall the fact that a draft of the Centennial Mill Company for Thirty-six thousand odd dollars, dated December 11, 1903, drawn on Clarkson & Co., was brought to the bank. Previous to that time the bank had had a number of transactions between the Central Mill Company and Clarkson & Co. These transactions dated back to 1906 or 8. In the meantime we had dealt with the Russo-Chinese Bank. I recognize the letter dated January 9/22, 1904, plaintiff's trial Number one. It was received by us about February 25, 1904. That letter was in the usual form in which we had been accustomed to receive acknowledgment of drafts by the Russo-Chinese Bank. The paper referred to was received in evidence as plaintiff's Exhibit "A," and read (Post p. 149).

# PLAINTIFF'S TRIAL 1.

CASE NO. 1517

Plaintiff's Exhibit A

UNITED STATES DISTRICT COURT.

Western Dist. of Washington.

-----  
vs.

The National Bank of Commerce

FILED.....19.....

FILED



U. S. DISTRICT COURT  
 Western District of Washington  
 Feb. 27, 1912  
 A. W. ENGLE, Clerk  
 By.....Deputy

1833

## RUSSO-CHINESE BANK

Codes used:—

ABC 4th ed.

Port Arthur, 9/22 January 1904.

ABC 5th ed.

A1 1898

Lieder's 1898

Western Union 1901

Seattle, Wash.

Telegraphic Address:

"SINORUSSE"

Dear Sirs,

We beg to acknowledge receipt of your fav—11/XII-03--  
 as well as of advised bill & documents for

(2) G \$37294.80.....on.....P'Arthur.....  
 .....on.....  
 .....on.....

sent us for collection Feb 25, 1904

## PLEASE NOTE:—

1. That, unless otherwise instructed, bills of any description sent us for procuring acceptance &/or for collection will be protested both for non-acceptance or non-payment and immediately returned to the sender.
2. When sending us for collection DOCUMENTARY BILLS or ONLY DOCUMENTS, clearly state in your letter accompanying same whether in case of dishonor:—
  - (a) both bill and documents are to be promptly returned with the relative deed of protest, or
  - (b) if the bills is to be returned & the relative documents are to be kept here at your disposal or
  - (c) if the goods are to be stored by us and fire insurance is to be covered pending receipt of your instructions.
3. Our Bank does not guarantee that the goods be stored in due time when there is no storage accommodation obtain-

able, and takes no responsibility whatever if same are not landed in perfect condition, nor if the goods are deteriorating or becoming of lower value in consequence of price fluctuations while under our Bank's control.

Yours faithfully

RUSSO CHINESE BANK

(Port Arthur Branch)

W. S. DAVIDSON.

In connection with the shipment by the "Hyades" our instructions were the usual printed ones for collection and return in New York funds, and that the documents were to be delivered only on payment. Those were the only instructions so far as I recollect. We did not give any instructions to insure or store this flour so far as I know. After some time we became involved in quite a correspondence with the Russo-Chinese Bank concerning respective rights of the two banks. In our letters we stated to them that we had knowledge of the fact that the draft was paid at the Port Arthur Bank and urged them to pay the money. The statement in our letter of July 13, 1906, that the receipt of the draft was never acknowledged I now find was a mistake. It probably was not called to my attention. We have searched the records of the bank and cannot find that the draft had been returned to us. If it had been returned it would have been immediately placed on my desk for my personal attention. I am certain that the draft never reached Seattle. Our bank paid the Centennial Mill Company the face of the draft without discount. The Mill Company subsequently paid the money back to us November 2, 1904. That was before the Russo-Chinese Bank had paid us. We had a guaranty from the Centennial Mill Company to protect us against that draft. Independent of the draft I had a verbal understanding with the president of the Centennial Mill Company that if we continued to send drafts to the Russo-Chinese Bank that it must be done at their request, and that they must stand for all liabilities, all risks, that were incurred by so doing. This was from Mr. Thomsen, president of the Mill Company, and was made before the shipment on the "Hyades," with the understanding that they were to take

every risk and responsibility so far as the handling of the drafts were concerned. On receipt of money from the Russo-Chinese Bank we paid it over at once to the Mill Company. The payment by the Russo-Chinese Bank included the face of the draft and interest on same from the time the flour left Seattle. We never paid the Russo-Chinese Bank anything in connection with its services for this transaction. The Centennial Mill Company has received its money for the flour and our bank has received the money paid for the draft.

And upon Cross-Examination, he said:

The general guaranty of the Centennial Mill Company was not in writing. The president of the company stated to me verbally that if judgment should be rendered against us in this case his company would pay it. The Centennial Mill Company re-paid us, principal and interest, November 2, 1904. After that time in further negotiations with the Russo-Chinese Bank, we were representing the Centennial Mill Company. We never received the letter of May 26, 1904, alleged to have contained the draft.

"Q Now, Mr. Spencer, counsel has directed your attention to the letter of January 9, 1904, addressed by the Russo-Chinese Bank to the National Bank of Commerce, in which there are certain printed sections beneath the letter or in the letter, in which it is stated that "Unless otherwise instructed, bills of any description sent to us for procuring acceptance or for collection will be protested both for non-acceptance or non-payment and immediately returned to the sender." Regardless of that provision which I have just read to you, I will ask you what the custom is among bankers, and what is the commercial usage among bankers, with regard to the return of the documents when drafts are protested, or otherwise?

MR. GREGORY: We object to that question upon the ground that there is no room here or no occasion for the introduction of any usage or custom. The transaction in this case was a definite contract, formed by the letters which said that the documents should be delivered as against the payment. There is no doubt or ambiguity concerning the matter, and, therefore, custom or usage is not admissible. I invoke the rule that you never can support a contract by custom or

usage unless the contract is ambiguous or needs to be supplemented by additional testimony.

(Argument.)

THE COURT: Overrule the objection.

MR. GREGORY: Note an exception.

THE COURT: Exception allowed."

A They are supposed to protest the draft for non-acceptance and non-payment and it is customary where large amounts are involved, to cable the fact that the draft has been protested for non-acceptance or non-payment. No cablegram was sent to us regarding that matter from Port Arthur.

Q I want to call your attention to the second subdivision of the printed matter contained on the letter to which I have just referred, which reads as follows: "When sending us for collection documentary bills or only documents, clearly state in your letter accompanying same whether in case of dishonor:— (a) both bill and documents are to be promptly returned with the relative deed a protest, or (b) if the bill is to be returned and the relative documents are to be kept here at your disposal or (c) if the goods are to be stored by us and fire insurance is to be covered pending receipt of your instructions.

I will ask you, Mr. Spencer, to state what the commercial usage among bankers, is, between the forwarding bank and the collecting bank, as to the duty or custom of the collecting bank to return the documents upon the dishonor of the draft, either for non-payment or for non-acceptance, and the documents accompanying them.

MR. GREGORY: We object to this question also upon the ground that this is not a proper subject for custom, and upon the further ground that the contract specifically and directly provides as to what is to be done.

THE COURT: I take it that you mean by "custom" the course of business.

MR. McCORD: That is all.

THE COURT: And I think it is proper to explain to the jury the course of business as bankers understand it.

MR. McCORD: That is exactly what I am trying to do.

THE COURT: Overrule the objection.

MR. GREGORY: Note an exception.

A They will hold all documents until they receive an answer. It is ordinarily customary for them to hold the draft and documents until they can receive advice, especially the bills of lading, in order that they may be able to take action in regard to the goods. I am speaking now in any event that they cable us we would give them specific instructions as to what to do. The reason those instructions are not included in our letter is from the fact that we never know what contingency may arise, consequently we leave it to their judgment to take such steps in the event of any contingency as they would take to protect their own property, by advising us.

MR. GREGORY: We ask that that portion of the answer commencing with "the reason" to the end go out as not responsive to the question and as incompetent, irrelevant and immaterial.

THE COURT: The motion to strike is denied.

MR. GREGORY: Exception.

THE COURT: Exception allowed.

Q (Mr. McCord) In the absence of instructions, what is the commercial usage in regard to the return of the documents? Suppose there is no telegraphic communication, they don't advise of the fact of the dishonor, the forwarding bank knows nothing about it, what is the duty of the bank upon the dishonor of the paper, and what is the custom in regard to the return of the draft and the documents?

MR. GREGORY: We note the same objection, Your Honor, as heretofore made.

THE COURT: Objection overruled.

MR. GREGORY: Exception.

THE COURT: Exception allowed.

Q (Mr. McCord) What is it?

A The custom would be to return the draft—protest and return the draft, either for non-acceptance or payment, as the case might be.

Q What would become of the documents?

A The documents would be held and probably used in the matter of storing the goods. They would be compelled,—should they store the goods and take such steps as might be necessary to protect our interest, the documents might have

to be delivered to the steamship company or used in the storage of the goods. The draft would be protested and returned and should be protested and returned promptly.

Q What is the custom, in case of the dishonor of a draft or non-payment, of the collecting bank, in the absence of instructions, in regard to storing and protecting the goods?

MR. GREGORY: We object to that as incompetent, irrelevant and immaterial, calling for a conclusion of law. The courts have very clearly defined what the powers and duties of collecting banks are.

MR. McCORD: I am not asking what the law is, I am asking what the banks usually do, in commercial usage?

MR. GREGORY: I submit it is not a question of usage?

THE COURT: Overrule the objection.

MR. GREGORY: Note an exception.

THE COURT: Exception allowed.

A They are expected to use diligence in taking such steps in regard to storage, insurance and so forth as they would take were the property their own and under their own immediate—and in their own immediate possession.

MR. GREGORY: We ask that the answer be stricken out as not responsive, as not stating what the custom is; it not having been stated over what extent of territory it goes, or whether it would apply in this particular instance.

THE COURT: Motion to strike is denied.

MR. GREGORY: Note an exception.

Q (Mr. McCord) As I take it, then, Mr. Spencer, these requirements or these suggestions that the Russo-Chinese Bank made to you as to what you should tell them when you sent the draft, what to do with it in case of dishonor, as I understand you the commercial usage would control that regardless of whether you told them to do so or not?

A Yes sir.

MR. GREGORY: Objected to as calling for a conclusion of law, the witness substituting his opinion for what the law says.

THE COURT: I think the question is objectionable as a leading question.



MR. McCORD: I am cross examining their witness, he is not my witness.

THE COURT: Well, that is so. I overrule the objection.

MR. GREGORY: Note an exception.

#### RE-DIRECT CROSS-EXAMINATION.

The draft should be returned by the collecting bank and generally is, unless there is some such reason as the following: The payer promises within ten days to take it up, in which case it would be foolish upon the part of the collecting bank to return it, but if there is no prospective payment by the drawee of the draft it should be returned, and bills of lading as well, unless they are required, or are essential to the proper care and handling of the goods by the collecting bank. There is temporarily a reason why the collecting bank should retain the bills of lading which does not apply to the draft. I knew the firm of Clarkson & Co. of Port Arthur. Did not know that they were agent of the steamboat line. Never knew it until it developed later; probably at the previous trial of this case. Cannot say whether Mr. Ostrander sent letter from Shanghai which he said that the reason that this flour had been gotten away was that Clarkson was also the agent of the steamboat line. Cannot state. May have seen letter of that kind. It is some eight years ago. I knew of certain documents involved in this case being at the Puget Sound National Bank. I saw them about August, 1906. Found all the documents there except the draft.

THE COURT:

Q In the case of flour, Mr. Spencer, sent to a foreign country, with a draft, 30-day draft or a time draft payable at sight, attached to a bill of lading, what is the course of business as between banks with regard to the custody of the flour during the time intervening from the presentation and acceptance of the draft, if it should be accepted, and the date when the payment on the draft would be due?

MR. GREGORY: Your Honor, I dislike very much to make an objection, but to be consistent I shall have to do so.

THE COURT: Yes, I will allow you an exception. I think this ought to be explained.

MR. GREGORY: I simply wanted to maintain my record on that.

THE COURT: You have your exception.

A The goods are supposed, or are, or at least should be stored in an independent warehouse, that is, a warehouse that is free from the interference of the consignee of the goods. Ordinarily the policies of insurance follow the draft, so that the bank has knowledge that the goods are insured. If the goods are deliverable upon acceptance and the party accepts the draft, of course he takes the bills of lading and the sending bank or the drawer assumes all liability from then on. If the drafts are payable—if the draft is drawn "Delivery of documents on payment only" then it is the duty of the bank, so far as it can exercise it by reasonable diligence, to hold possession indirectly, by warehousemen, of those goods, until it delivers the bill of lading or the warehouse receipts which are substituted for the bill of lading.

#### RE-CROSS EXAMINATION.

Among documents returned to the Puget Sound National Bank in 1906 were bills of lading of either two or three drafts, which should have been delivered to the consignee upon the payment of the draft, but they evidently had not done so and returned them, for what reason I could not tell. They were shipments with drafts on Clarkson & Co. The drafts had been paid, but the documents were returned. The documents with the Puget Sound National Bank were offered to us on condition that we repay the amount received by us with interest. There was no unconditional offer.

#### RE-DIRECT EXAMINATION.

I cannot say whether the bills of lading just spoken of referred to two drafts for \$4136.00 and \$16,155.20 or not. I think those were the bills of lading. I as a banking man understand that when a bank receives a draft for collection, with the bill of lading attached, and there is no instructions of any kind given excepting that the documents shall be withheld until payment, the collecting bank in such a case assumes responsibility for the goods. They assume the responsibility

of giving the merchandising company the same care that prudence on their own part in protecting their own goods would dictate. They assume—when the steamer comes in—and cannot assume otherwise, that the goods go from that steamer into the warehouse. The bills are presented to the drawees. If they accept and are responsible the bank can naturally assume that no further attention is necessary on its part, excepting to hold the bills of lading and nominal possession of the goods until the draft is paid, unless it is directed to deliver when the draft is accepted, and the drawee is, in the opinion of the bank, responsible. Its responsibility so far as looking after the goods is over. The bank is usually supposed to use the same judgment that it exercises in the preservation of its own funds. I meant that the goods should be stored in an independent warehouse. In this case I meant that the Russo-Chinese Bank was responsible because Clarkson & Co. were the agents of the steamboat company, and also the parties who were buying the flour. Supposing that the bank at Port Arthur did not know that Clarkson was the agent of the steamboat line, I should say that under those circumstances, if it had presented the draft on its arrival, procured acceptance, transacted the business in the usual way, had no knowledge or suspicion from the fact that Clarkson & Co. was the agent of the steamship company, they could not be expected to go down and watch the unloading of the boat.

#### WITNESS RECALLED FOR RE-CROSS EXAMINATION.

Q (Mr. McCord) Mr. Spencer, referring to the question that was asked you last night by Mr. Gregory, for the plaintiff, I think he asked you if a draft drawn as this one had been drawn, with documents attached, that after the acceptance of the draft, pending the pay date of the draft, if the goods were housed in an independent warehouse, you would not consider it the custom of bankers to look after that shipment; is that correct?

MR. STILES: If Your Honor please, I object to this as not cross examination.

MR. McCORD: Counsel brought it out, Your Honor.

MR. STILES: Only after counsel's insistence had brought

out other matters. We asked this witness just three things, which I called Your Honor's attention to yesterday.

THE COURT: This question, as far as it has been stated, is almost a repetition of one of counsel's that was asked last night by your side. I don't know what else is coming, what else there is to it. State your question and let me hear it.

(Question read.)

A I answer no to that question.

Q (Mr. McCord) Now, counsel also asked you if there was nothing to excite the suspicion of the bank as to the fact if the goods being in the possession of the consignee or being disposed of, would it be the custom of the bank to look after the shipment. I think you answered that question no. I will now ask you, if there was anything to excite the suspicion of the collecting bank as to whether the goods were in the hands of the consignee wrongfully or were being sold by him, what would be the custom of the bank, if they had this suspicion or did have this knowledge of the fact that the goods were in the hands of the consignee contrary to the instructions of the bank or that the goods were being sold by the consignee before the payment of the draft?

MR. GREGORY: We object to the question, first, upon the ground that it is not proper cross examination, and, secondly, that it assumes a state of facts which are not proven to have existed—that there was any reason for suspicion on the part of the bank at Port Arthur. There is no testimony on the point at all.

MR. McCORD: That is the question counsel brought right home, Your Honor.

MR. GREGORY: No, he assumes. Of course the question amounts to this, assumes there was something suspicious, "What would you do?" I concede at once they ought to do something.

MR. McCORD: Counsel asked him the question, if there was not anything suspicious what he would do. Now I simply put it in the converse form.

MR. GREGORY: The question may it please the court, must refer to the actual condition of affairs. We are not dealing with purely hypothetical questions.

THE COURT: The question Mr. McCord asked of this

witness a while ago was if there was anything to excite suspicion.

MR. GREGORY: Yes.

THE COURT: Now, that is a fact. I don't know whether the witness knows enough to answer it or not, whether he is possessed of knowledge. On cross examination they have a right to ask him.

MR. GREGORY: May it please the court, if the question is this way, "if there was something suspicious, was it the duty of the bank to do something?" which of course must require the obvious answer "Yes, I concede that, it is a self-evident and patent fact, but the question here is, "Was there anything suspicious?" I will submit to the ruling.

THE COURT: I will overrule the objection.

MR. GREGORY: Note an exception.

THE COURT: Exception allowed.

Q (Mr. McCord) Answer the question.

A We should at once take such steps—

THE COURT: (Interrupting) Oh, no.

Q (Mr. McCord) Don't say what you would do. I ask you what the usage was.

A To take such steps as would protect the drawer, the actual owner of the goods.

Q And what would you mean by taking such steps as would protect him?

MR. GREGORY: I make the same objection, may it please the court, to all of this examination.

THE COURT: Overruled.

MR. GREGORY: Exception.

A Take possession of the goods, get them out of the possession of the drawee.

#### RE-DIRECT EXAMINATION.

Q (Mr. Gregory) Have you ever been in Port Arthur, Mr. Spencer?

A I have not.

Q So that whatever you have testified to concerning the custom has been what you have heard from others?

A No, it is commercial usage.

Q Who was to pay the freight in connection with the shipment of the "Hyades," do you remember?

A Mr. Clarkson.

Q Mr. Clarkson. So if the Russo-Chinese Bank had tried to move this cargo out of the warehouse or away from the Steamboat Company, they would still have had to pay the freight, wouldn't they?

A To Mr. Clarkson.

Q No, to the Steamboat Company.

A Not if the freight had already been paid.

Q But I just ask you where it was to be paid?

A In Port Arthur.

Q Yes. Now, assuming Clarkson & Co. had not paid it, if the bank were to get it out of Clarkson's warehouse they of course would have had to pay the freight?

A Certainly.

#### RE-CROSS EXAMINATION.

Q (Mr. McCord) Do you know anything of your own knowledge as to who was to pay the freight, Mr. Spencer?

MR. GREGORY: The bill of lading speaks for itself.

A It was not, from my memory, a C. I. F. draft.

Q (Mr. McCord) What is that?

A It was not their custom to draw C. I. F. drafts.

Q (Mr. Gregory) What does that mean, Mr. Spencer?

A That means all charges paid on this side, costs, insurance and freight.

Q (Mr. Gregory) I would like to know what those words stand for—"C. I. F."?

A I don't now remember what "C." stands for. "I." for "insurance" and "F" for "freight."

Q (Mr. Dorr) Cartage, isn't it?

A Costs, I think.

Q (Mr. Gregory) Costs, insurance and freight?

A I think it is costs, but I would not be positive as to that.

(Witness excused.)

H. F. Ostrander, produced as a witness on behalf of plaintiff, testified as follows:

I live at Seattle. I am in the shipping business. I was



connected with the Centennial Mill Company for about ten years, beginning with 1898, and running to the fall of 1907. From 1901 to 1905 I represented the Mill Company on the Coast of Asia, from the Philippines to Vladivostok, which took in Port Arthur. My headquarters at first were in Shanghai, but afterwards in Kobe, in 1903 and 4. I have been in Port Arthur. At that time it was a town of between thirty and forty thousand, and was a place of importance in supplying goods to the Russian troops. I knew the firm of Clarkson & Co. from the spring of 1898. The Centennial Mill Company did business with Clarkson & Co. from that time on to the extent of several hundred thousand dollars a year, all in flour. Shipments were made to Vladivostok, Port Arthur and Dalny. Dalny is about forty miles east of Port Arthur. Clarkson had a warehouse system in each place. I was in Port Arthur late in January and early in February, 1904, four or five days before the outbreak of the war. I was there on business of the Centennial Mill Company. Visited Clarkson & Co. at the time. The reputation of Clarkson & Co. commercially was first class as far as I could find out. There was no special arrangement with our concern in regard to the shipment of flour over there by the Boston Steamboat and Boston Towboat Company's boats. Clarkson & Co. were the agents of those companies at Port Arthur up to the outbreak of the war. It was a well known fact that Clarkson & Co. were agents. Boats ran about once a month. Our shipments would be about eighty per cent. of the cargo for Port Arthur and Dalny. A full cargo, if all flour, would be from one hundred and fifty to two hundred thousand sacks. Business between the Centennial Mill Company and Clarkson & Co. was transacted I think by Mr. Thomsen, president of the Mill Company, who was out there in 1908 and 9 and again in 1901 on the company's business. When I was there in 1904 there was some rumors of war, but it was not expected soon. I was in Port Arthur probably a week, and went from there to Tientsin. I met Davidson. He and I left Port Arthur on the same steamer for Chin Wan Tau. I did not see the Boston Towboat Co. ship "Pleiades" at Port Arthur on that voyage. I saw her afterwards at Che Fu. While at Port Arthur I saw the officers of the Russo-Chinese

Bank. According to my usual custom I gave the bank no instructions, nor did I make any request as to what it should do, if anything, in connection with goods which had been sent under drafts and bills of lading which it held. I don't think I was authorized to give any such instructions. If anybody had been so authorized it would have been myself probably. I believe the "Hyades" arrived there some time previous to my arrival several weeks before. I think some of the "Hyades" flour was there at the time. There was some flour on hand which I saw. I could not say how much. Perhaps five or ten thousand sacks or more. Couldn't say. I gave no instructions to the bank about the "Hyades" flour.

### CROSS EXAMINATION.

I stated in my direct examination that it was a well understood fact at Port Arthur that Clarkson & Co. were the agents of the Towboat Company. The Bank could not have helped knowing it.

### AFTERNOON' PROCÉEDINGS, February 28, 1912.

ARTHUR T. SHORT, produced as a witness on behalf of defendant, having been first duly sworn, testified as follows:

Q (Mr. McCord) What is your name?

A Arthur T. Short.

Q How old are you?

A Thirty-nine.

Q Where do you reside?

A South Porcupine, Ontario.

Q How long have you resided there?

A About a year.

Q Prior to that time where did you reside?

A In Colbalt.

Q How long did you reside there?

A Four years.

Q In the years 1903 and 4—from 1899 to 1904 where did you reside?

A In Port Arthur, China.

Q What business were you engaged in there, Mr. Short?

A I was a bookkeeper for Clarkson & Company up to August, 1902, and after that date I had charge of the books, and joint manager, up to February 4, 1904.

Q When did you first enter the employ of Clarkson & Company?

A In December, 1899.

Q At what place?

A At Port Arthur.

Q And how long did you remain with Clarkson & Company after that?

A Up until February 4th, 1904.

Q Where were you in the month of January?

A In Port Arthur.

Q Were you away from there during the last year at any time, that is, between the first of January, 1903, and the 4th of February, 1904?

A Oh, I was at Tientsin and Chinwangtau.

Q How frequently?

A Beg pardon?

Q How frequently were you there?

A Oh, I was there twice.

Q At what time?

A Oh, it would be about February, 1903, the first, and along in the summer.

Q Of 1903?

A 1903.

Q When did you say you became manager of the Clarkson business?

A In August, 1902.

Q Who was the other manager? You say you were jointly?

A W. S. Davidson.

Q Mr. Short, you may just state what your duties were as joint manager, what you did in connection with the Clarkson business?

A Well, we bought and sold goods; we were agents for steamships, and just the regular duties of manager of a branch office.

Q Did you make contracts—

A (Interrupting) Yes.

Q (Continuing)—for the firm? What business was Clarkson & Company engaged in at Port Arthur?

A He was engaged in the mercantile business, agent for steamboat companies, insurance companies, and so on.

Q Do you recall the arrival of the ship "Hyades" at Port Arthur?

A I do.

Q In January, 1904?

A I do.

Q Do you recall the date that she arrived?

A Well, I can't state the exact date, but it was around the middle of the month.

Q Yes. Was any cargo unloaded from that ship, from the Centennial Mill Company?

A Yes.

Q Of what did it consist?

A Well, there was flour for Clarkson—

Q (Interrupting) How much flour?

A Thirty-six odd thousand bags.

Q Now, do you recall anything about a draft being drawn at that time by the Centennial Mill Company on Clarkson & Company for that shipment of flour?

A Yes, there was a draft drawn.

Q Just state what it was?

A Well, it was a draft, the same as all drafts from Centennial mills, at ninety days sight.

Q And was it a draft unsecured or with documents?

A There were documents attached.

Q What documents were with it?

A There was a bill of lading and copy of the invoice, and the insurance policy.

Q Anything else that you recall.

A No.

Q When did the draft arrive at Port Arthur, do you know?

A The draft arrived about the same date that the ship arrived.

Q How?

A The draft arrived about the same date that the ship did, within a few days of the boat.

Q Was it presented to Clarkson & Company by the bank—or who received the draft?

A The Russo-Chinese Bank.

Q Was it presented to Clarkson & Company?

A Yes.

Q When was it presented, do you know?

(No response.)

Q Was it accepted?

A Yes, it was accepted.

Q When?

A It was accepted within two or three days after the steamship or—after the steamship arrived, during the discharging of the boat.

Q How much was the draft for?

A Thirty-six thousand odd dollars, gold.

Q Do you know who accepted it on behalf of Clarkson & Company?

A I accepted it.

Q How was it accepted?

A It was written across the face of the draft, "Accepted. Clarkson & Company, at ninety days sight from date, Clarkson & Company per A. T. Short."

Q That was you think about what time?

A Of, that would be somewhere I should judge about—or from the 20th to the 25th, I am not sure of the date.

Q Of January, 1904?

A Of January, 1904.

Q When the goods arrived, where were they put?

A They were—from that boat they were put in Clarkson's go-down.

Q What boat was this, you say?

A This was the "Hyades."

Q Put in one place?

A Into Clarkson's go-down—Clarkson's warehouse.

Q What is a go-down?

A Well, it is a warehouse for storing cargo.

Q Is it like one of the docks here, built out into the water, or on the mainland?

A No, it was on the mainland.

Q Can a ship get up to the go-down?

A No, the boats were always discharged out in the—into lighters out in the basin. There were no docks there at all.

Q After the acceptance of the draft, I will ask you, Mr. Short, to state whether or not you had any arrangement with the Russo-Chinese Bank in regard to the sale of the flour by Clarkson & Company. If so, state what the arrangement was?

A When we accepted drafts on flour, we gave the Russo-Chinese Bank—

MR. GREGORY: (Interrupting) You are now being directed towards this special draft.

MR. McCORD: Yes.

MR. GREGORY: This special draft.

A Well, when we accepted this special draft we gave a letter of guaranty to the Russo-Chinese Bank—that was a letter that the cargo was the property of the Russo-Chinese Bank until paid for.

Q (Mr. McCord) What else did it provide?

A I can't give you the whole wording of the thing; that is the gist.

Q Well, in regard to the sale of it?

A Beg pardon?

Q Was there anything in the agreement regarding the sale of the cargo?

A Well, we sold the—we would sell the flour.

Q I asked you what was in the agreement in regard to your selling of the flour?

A Well, the letter of guaranty was that we would sell the flour and deposit the money in the bank.

Q (Mr. Gregory) Have you the letter here, Mr. Short?

A Beg pardon?

Q (Mr. Gregory) Have you the letter, or a copy of it, here?

A No, sir, I have not. It was the regular form of bank guaranty; it was a printed form.

MR. McCORD: We demanded the original a year ago.

MR. GREGORY: We haven't got it.

MR. McCORD: You haven't got it?

MR. GREGORY: No.

Q (Mr. McCord) Well, when was this letter of guaranty,



containing the provisions that you have named, executed with reference to the acceptance?

A At the time of the acceptance of the draft

Q What became of the documents?

A The documents were left at the bank. Oftentimes we took the documents; others we left them there.

Q What did you do in this case?

A They were left there.

Q With the Russo-Chinese Bank?

A Yes. I went to the bank, accepted the draft, and gave the letter of guaranty, and then the papers, instructions, were handed over to the shipping clerk in Clarkson's office to look after the rest of it.

Q Then how long after this letter of guaranty was executed between you and the Russo-Chinese Bank was it until you began to sell the flour?

A Well, we had some old cargo, some old flour in the warehouse, which we always made it a point to dispose of first, because it was simply piled on the ground, and we got rid of the old flour before we tackled the new.

Q Can you give any estimate of the quantity of flour that was in the go-downs upon the arrival of the "Hyades" flour?

A There was probably from six to eight thousand bags.

Q And where did you get that flour from?

A That flour came from the Centennial Flour Mills, or the bulk of it; I think there was a small shipment of a thousand bags that came in from a concern—Sprague somebody, that would have been in with that lot.

Q You say you left the employ of Clarkson on the 4th of February?

A 4th of February.

Q How many sacks of flour—if you know, state—were sold by you between the time of the acceptance of the draft and the time that you left Clarkson & Company's employ?

A Well, sold by Clarkson's office, including myself, I should say about probably ten or twelve thousand bags.

Q And to whom was that sold?

A Oh, it was sold mostly through the comprador by Clark-

son & Company, to Chinese contractors working on the forts and on the government roads and—

Q (Interrupting) Were the purchasers of this flour responsible people financially?

A They were all guaranteed by the comprador, who was guaranteed by other responsible Chinese.

Q Was any other flour other than the shipment of the "Hyades" flour—any flour subsequent to the arrival of the "Hyades" flour, delivered to Port Arthur prior to the time you left there or about the time you left?

A No.

Q After you left on the 4th did any other shipment come in?

A Yes, there was a boat, the "Pleiades" arrived there the day previous to the war.

Q That was about the—

A (Interrupting) 7th.

Q (Continuing) The 7th. The war commenced when?

A At twelve o'clock on the night of the 8th.

Q Was any flour unloaded from the "Pleiades"?

A The "Pleiades"?

MR. DORR: He says he was not there then.

MR. McCORD: He stayed at Port Arthur.

MR. DORR: Did you say you had left Port Arthur?

A No, I was not with Clarkson at that time.

Q (Mr. Dorr) You were still in Port Arthur?

A I was still in Port Arthur. Yes, there was loaded into the lighters from the boat I should say from 1,500 to 2,000 sacks.

Q (Mr. McCord) How long did the "Pleiades" remain in port?

A Remained there until the—oh, I don't know, 14th or 15th; I am not sure of the date.

Q Did you leave Port Arthur on that vessel?

A I left on that vessel.

Q On the "Pleiades"?

A On the "Pleiades."

Q Where did she take the cargo of flour to?

A To Che-fu.

Q Unloaded it there?

A Unloaded it there into Cornaby-Eckford's go-downs.

Q From what source did Clarkson & Company get their flour during the year 1903?

A Mostly from Centennial Mills.

Q What do you mean by "mostly"?

A Well, they had that small shipment from Sprague, and I bought one small shipment of 500 or a thousand bags from the Ogleby Flour Mills of Montreal.

Q How much was the Sprague shipment?

A About a thousand bags.

Q What quantity of flour did you handle at Clarkson & Company during the year 1903?

A I can't tell you exactly; probably in the neighborhood of a couple of hundred thousand bags; perhaps more than that.

Q All of that flour you say was gotten from the Centennial Mills—practically all of it?

A Yes, as far as I—

Q (Interrupting)—Now, state how that was sold to Clarkson & Company?

A Draft, ninety days sight, bill of lading attached.

Q When was the payment to be made?

A Payment was made as the flour was sold, money was deposited in the bank. When the draft matured, then the draft was taken by Clarkson & Company, paid in full.

Q What I am trying to get at is, what sort of drafts were they, were they drafts against payment or drafts open?

A Drafts against documents.

Q Yes, documents attached?

A Documents attached.

Q To be delivered when, upon payment?

A Upon payment.

Q Now, in all your dealings with the Russo-Chinese Bank, in handling the other shipments of the Centennial Mill Company, I will ask you what arrangement if any was made with the bank in regard to the handling of this flour?

MR. GREGORY: We object to the question as incompetent, irrelevant, immaterial and not binding in this special case.

THE COURT: I overrule the objection.

MR. GREGORY: Note an exception.

A Will you give me the question again, please?

Q (Mr. McCord) I want to know what course of dealing Clarkson & Company had with the Russo-Chinese Bank in regard to other shipments of flour prior to the "Hyades" flour.

A Well, from the year 1900 the same rule existed. We always gave the bank a letter of guaranty against—a letter of guaranty to take delivery of the cargo and the cargo belonged to them until it was paid for, and we sold it out and deposited the money in the bank from time to time as Clarkson & Company got it in.

Q Now, I will ask you whether or not the bank knew, in the handling of this flour, that Clarkson & Company were in possession of it?

A Whether the bank knew whether Clarkson & Company were in possession?

Q Yes.

A Certainly they did.

Q Did they know that Clarkson & Company were in possession of the "Hyades" flour, 36,000 sacks?

A They could not help but know it.

MR. GREGORY: I ask that the answer go out as not responsive.

THE COURT: Motion denied.

MR. GREGORY: Note an exception.

THE COURT: Exception allowed.

Q (Mr. McCord) Did you discuss the matter with them?

A When we went to the manager of the bank and accepted the drafts and gave the letter of guaranty, it was done with the manager of the bank.

Q Who was the manager of the bank?

A A. V. Ofsvankin.

Q Who is the other manager of the bank?

A There was a man by the name of Friedberg, but he was not a joint manager, he was simply an attorney to sign drafts and things; and Mr. Berg, one of the directors of the bank from St. Petersburg, was also there inspecting.

Q Let me bring your attention down to January and February, 1904, and up to the time you had left there, who was the manager of the Russo-Chinese Bank?

A Ofsvankin.

Q The same man you have just mentioned?

A Yes sir.

Q What was his position?

A What was his position?

Q Yes.

A Manager of the Russo-Chinese Bank.

Q Was anyone of equal authority with him?

A No.

Q Or was he sole manager?

A No, he was the manager.

Q Do you know where he is now?

A I don't know where he is.

Q With what persons did you have your conversation in regard to this "Hyades" flour?

A With the manager of the bank.

Q Ofsvankin?

A Ofsvankin.

Q I will ask you whether this letter of guaranty recognizing the ownership of the flour in the bank and permitting it to be sold and accounting for the proceeds to the Russo-Chinese Bank—whether that applied to the other shipments of flour?

MR. GREGORY: Objected to as leading.

THE COURT: It is leading, but it is unimportant. I will overrule the objection.

MR. GREGORY: Note an exception.

THE COURT: Exception allowed.

A What was the question again?

Q (Mr. McCord) I will ask you whether this same arrangement which you have detailed in regard to the "Hyades" flour applied to other shipments of flour made by the Centennial Mill Company to Clarkson & Company prior to that time?

A Yes.

Q I will ask you if Clarkson & Company were ever the agents of any steamship companies?

A They were.

Q Of what steamship companies?

A They were agents for Butterfield & Swire, Jardine-Matheson, the Chino Navigation Company, the Boston Tow

Boat Company,—of, various other steamers that would come in there—tramp steamers.

Q What company owned the steamship “Hyades”?

A The Boston Tow Boat Company.

Q Clarkson & Company were agents for that boat?

A They were agents.

Q When did Clarkson & Company become the agent of that steamship company?

A Oh, I don’t know.

Q How long before January 1st, 1903?

A I can’t state definitely; probably six months or maybe a year. It was a new line of steamers running into Port Arthur.

Q I will ask you whether the Russo-Chinese Bank knew that Clarkson & Company were the agents of this steamship company?

A They knew it when the first consignment of flour.

Q How do you know?

A Because they were told when the drafts were accepted and the letter of guaranty given to the bank.

Q Who told them?

A I would tell them or Davidson would tell them. The object of getting a ninety days sight draft was that we could get delivery of the flour without payment, and that we paid in the money as soon as we got it—as soon as the flour was sold the money was collected in.

MR. GREGORY: I ask that the portion of the answer beginning with “the object” to the end go out as not responsive.

THE COURT: The motion is denied.

MR. GREGORY: Exception.

THE COURT: Exception allowed.

Q (Mr. McCord) How many warehouses were there in Port Arthur doing business?

A There was Ginsburg, who occupied the warehouse formerly occupied by Clarkson and belonging to the bank; there was the Chinese Eastern Railway Seagoing Service had a go-down, and I think that is all.

Q Three?

A Three. There may have been one or two little ones that I don’t remember.



Q I will ask you whether the Russo-Chinese Bank and Clarkson were ever engaged jointly in the warehousing or go-down business.

A From 1900 up to the beginning of 1903 the Russo-Chinese Bank owned the warehouse and were agents for a Russian steamboat company, and Clarkson operated that go-down or warehouse for the Russo-Chinese Bank; that is, they would land the cargo from the bank's steamers—the steamers consigned to the bank,—they would land the cargo in the warehouse, along with their own, and they paid the bank a monthly rental, as well as a commission on their stevedoring charges.

Q I will ask you whether at the time of the arrival of this flour there was any insurance taken on it, and, if so, by whom?

A Clarkson carried insurance on his flour, or on the flour and rackarock beer and general goods of his own in his warehouse, and this insurance was held or transferred to the Russo-Chinese Bank as security against fire.

Q Do you remember a draft of \$4,136 that arrived at Port Arthur in November and matured about the 8th or 21st of March, also one of \$16,155?

A Yes sir.

Q Maturing some time in March, 1904?

A Yes sir.

Q I will ask you, Mr. Short, whether or not those drafts were accepted?

A Those drafts were accepted.

Q They were drawn by whom?

A By the Centennial Mill Company.

Q Through what bank here?

A Through the National Bank of Commerce.

Q And were there any documents attached to them?

A Yes.

Q How were the drafts drawn with reference to payment?

A Ninety days sight, documents attached.

Q To be delivered on payment?

A On payment.

Q I will ask you what if any arrangement was made with the Russo-Chinese Bank in regard to the flour securing the \$4,136 draft and the one securing the \$16,155 draft?

MR. GREGORY: We object to the question as incompetent, irrelevant and immaterial, and not referring to the draft in question.

THE COURT: I overrule the objection.

MR. GREGORY: Note an exception.

THE COURT: Exception allowed.

A The same arrangement as was made with the "Hyades"; that was an arrangement which had been going on from the time I went there.

MR. GREGORY: I ask that the last part of the answer go out as not responsive, and ask that the witness be instructed not to be so ready in answering.

THE COURT: No, I decline to give that instruction. He is being examined in chief, but most relevant matter sometimes comes out in that way.

MR. GREGORY: It may be so, Your Honor, but he should be interrogated.

THE COURT: He should answer fully the questions that are asked him, tell the truth, the whole truth and all about it.

MR. GREGORY: Swiftmess is not considered a virtue sometimes in a witness, Your Honor.

MR. McCORD: I ask for an exception to the counsel's remark.

THE COURT: You may have an exception.

Q (Mr. McCord) I will ask you what became of the flour securing these drafts?

A They were put into Clarkson's warehouse and afterwards sold.

Q What became of the proceeds of the flour?

A Deposited in the Russo-Chinese Bank, to the credit of Clarkson & Company.

Q What became of all of the proceeds of the sale of Clarkson's goods, of the earnings of his firm, where were they deposited?

A They were deposited in the Russo-Chinese Bank.

Q Was there any other place for their deposit there?

A No, no.

Q I say, were they deposited anywhere else?

A No, everything was put into the Russo-Chinese Bank.

Q Did you know the firm of Ginsburg & Company?

A I did.

Q What was their financial standing?

A Oh, Ginsburg & Company were worth millions.

Q Now, Mr. Short, when did you send in your resignation, if at all, to Clarkson & Company, as joint manager of his institution at Port Arthur?

A I wrote Mr. Clarkson about or on the first of January, 1904, giving him the usual month's notice from his company.

Q And did you receive a reply to that letter?

A I did.

Q Were you let out or did you resign?

A No, I resigned. Davidson and myself did not agree and so I had formed connections with Guntz & Albers on joint account and went on with them.

Q Prior to the time, the 4th of February, when you say you left the employ of Clarkson & Company, were you devoting your time or any of your time to other business?

A No, no, that was being attended to by Guntz & Albers, and I was closing up the books with Chochovitz and looking after my own interests, that I would get my own commission which was coming to me on the profits of the business.

Q Were you to get any of the profits of the business that Clarkson did?

A On the profits of Clarkson's business.

Q Did you ever get it?

A No, I didn't.

Q What was the financial reputation of Clarkson & Company's business at Port Arthur during the year 1903 and up to the outbreak of hostilities between Russia and Japan?

A Clarkson's financial standing in Port Arthur was all right. He always had sufficient money on his books and cargo in the go-downs to cover any liabilities that he might have.

Q I will ask you if in 1903 Clarkson and Company had any overdraft arrangement with the Russo-Chinese Bank, and, if so, for how much and how long had it been standing?

A In 1903 there was an overdraft of Clarkson & Company at the bank—oh, varying from fifty thousand up. That over-

draft, when I went to Clarkson in 1899, was somewhere around \$90,000.

Q Roubles or dollars?

A Ninety thousand roubles, and that had never interfered with the business of Clarkson & Company.

Q Well, state what arrangement was made, if any, with reference to the retirement of that overdraft by notes or drafts?

A In the early part of December Mr. Clarkson came to Port Arthur and Mr. Ofsvankin, the manager of the bank, made an arrangement with him by which he was to wipe off that fifty thousand roubles at three thousand roubles a month—three thousand roubles a month, by drafts drawn by Clarkson & Company, Port Arthur, on Clarkson & Company, Vladivostok; these drafts were to be paid in Vladivostok.

Q How was it carried on your books?

A It was wiped off the books by these drafts and credited to Clarkson of Vladivostok.

Referring to the deposition of Friedberg, I think it is, that part of it known as Clarkson's account, I will ask you to turn to that (handing paper to witness)?

A Here is an account with—a copy of Clarkson's account from December, 1903.

Q Does that fifty thousand overdraft appear on that account?

A It does.

Q Down to what date?

A Well, it is carried along right through the whole shooting match.

Q What did you say had been done with that with reference to drafts?

A That had been settled by drafts at 3,000 roubles a month. Two thousand was the first draft and the balance were 3,000 a month, payable in Vladivostok.

Q And then Clarkson & Company, if I understand you correctly, took credit for that fifty thousand roubles that was taken up by drafts on Clarkson & Company at Vladivostok?

A I didn't catch that.

Q I say, the overdraft was wiped out and drafts taken on the other, was it?

A On Vladivostok. There was an overdraft at Port Arthur on the beginning of 1904, it had been closed off by drafts on Vladivostok and accepted by the bank.

Q Are you able to state from your examination of that account whether or not if that fifty thousand roubles that had been taken off by these drafts—if Clarkson was given credit for that 50,000 roubles or was he still charged with it?

A Well, according to this statement he is still charged with it.

Q Now, I wish you would turn to the cash account in the same deposition and state how much money was remitted by the Russo-Chinese Bank from Port Arthur to Vladivostok from January, 1904, down to August, 1904. Are you able to state it from that.

MR. GREGORY: We object to the question on the ground that the witness is not qualified as an expert yet.

MR. McCORD: He said he was a bookkeeper.

MR. GREGORY: Do I now understand he is being called upon to give expert testimony concerning the evidence produced by the plaintiff?

MR. McCORD: I am not asking for that, I simply want him to figure the books—total it, Your Honor.

MR. GREGORY: The books show for themselves.

MR. McCORD: They will show it in detail, but I simply want a resume of it.

THE COURT: I think you are entitled to it. Objection overruled.

MR. GREGORY: Note an exception.

A (After examining and figuring) 79,000 roubles transferred from Port Arthur to Vladivostok from the 25th of March to the 26th of June.

Q (Mr. McCord) Is that all that it shows?

A That is all that I can pick out here.

Q Well, to whom was it transferred?

A It was transferred, according to this, to Clarkson & Company of Vladivostok.

Q Are you able to state how much money was collected in or received by the bank at Port Arthur from Clarkson &

Company, between the 25th of January and down to so far as the account goes, August, I believe.

A From these accounts I guess I am.

Q Yes, from those accounts?

A I think so.

Q What is that?

A I think so.

MR. GREGORY: What year?

MR. McCORD: 1904.

A (After examining and figuring) From the first of January, 1904, up to the last statement on this account, November, 23, there had been deposited with the bank 126,928 roubles and 97 kopeks.

Q (Mr. McCord) How many roubles?

A 126,128-97.

Q You have compared it, have you, so that you think that is accurate?

A I have not gone through it the second time; I think that is about right, though. (Witness figuring) That is as near correct as I can make it.

Q Mr. Short, at the time you left Clarkson's employ I will ask you to state what goods were on hand other than flour, if any?

A There was some rackarock.

Q How much rackarock?

A Oh—

Q In roubles?

A Oh, probably ten or fifteen thousand roubles.

Q And what else, anything?

A And some beer.

Q How much beer?

A Oh, probably two thousand dollars.

Q And do you know the market price of flour at the time you left there?

A It was selling from two forty to two-sixty five roubles.

Q A sack?

A A sack.



## CROSS EXAMINATION.

Q (Mr. Gregory) What is your present business, Mr. Short?

A I am in the mining machinery and supply business.

Q At What place?

A At South Porcupine, Ontario.

Q South Porcupine, Ontario. What is the street address?

A Beg pardon?

Q What is your street address?

A No street.

Q South Porcupine, Ontario?

A South Porcupine?

Q Oh, yes. Have you come here purposely to be a witness in this case?

A Beg pardon?

Q Have you come here purposely to be a witness in this case?

A I have.

Q You came here once before also, did you not?

A Yes sir.

Q How much time have you been spending as a witness on this case?

A I left home on the 10th of the month.

Q And before, how long were you gone?

A I was here about five weeks.

Q About five weeks. Have you any associate in your business?

A I have.

Q And he carries on the business in your absence?

A Yes.

Q Mr. Short, you say you left the firm of Clarkson & Company at what time?

A On February 4, 1904.

Q You have heard read here the depositions of Mr. Davidson and also Mr. Clarkson, have you not?

A I have.

Q You know these gentlemen have said you left the firm in December, 1903?

A That I did?

Q Is that statement correct?

A No sir.

Q It is absolutely false, is it?

A It is wrong. I don't say intentionally wrong, but it is wrong.

Q It is positively wrong?

A It is positively wrong.

Q You left the firm permanently you say at what date ?

A On February 4, 1904.

Q And you left them entirely of your own initiative?

A Yes, there was differences between Davidson and myself which we could not settle and so it was me to get out.

Q What was that difference about?

A Oh, different things, Davidson wanted to be the big man and I would not consent.

Q I see. How long had you and he been acting together?

A From August, 1902.

Q Have you any personal knowledge of the transactions connected with the Ginsburg sale, were you in Clarkson's employ at that time?

A No, no.

Q Do you know or have you any personal knowledge concerning the payment of this draft of the "Hyades" flour?

A I don't just catch your question.

(Question read).

A No.

Q You were not in the employ of Clarkson & Company at that time?

A No.

Q And that draft became due about the 30th of April, 1904, didn't it?

A No, I was not.

Q So you know then—

A (Interrupting) Know nothing whatever of the payment.

Q Now, Mr. Short, regarding this document which you say was given by Clarkson & Company, will you please state, as nearly as you can, the exact language of that document?

A It is pretty hard for me to state it. It read something that the cargo was delivered to Clarkson & Company on the guaranty that the cargo was the property of the bank and that as it was sold and paid for the money was to be turned in to the Russo-Chinese Bank.

Q Who signed that document?

A Who signed it?

Q Yes.

A I signed it.

Q You signed it.

A I signed it.

Q And was your signature the only one?

A Mine was the only one to that document.

Q It had been your custom, you say, after that to proceed to sell the flour?

A Sell the flour.

Q And you put the money in the bank?

A Put the money in the bank.

Q What did you do about the insurance when you sold the flour, as to the remaining insurance, you simply had a blanket insurance, did you?

A Clarkson & Company had insurance on their—the contents of the warehouse for—I can't tell you exactly what, somewhere around 50,000 rubles, and that was carried all the time.

Q This document which you signed was given to the bank?

A To the bank.

Q And what did the bank give you?

A What did the bank give us?

Q Yes.

A Permission to take the cargo.

Q Did it give you any writing?

A No.

Q No writing at all?

A No writing.

Q Didn't they deliver you the documents sometimes?

A Sometimes they did. If we asked for them we would get them.

Q Didn't you always ask for the documents?

A No.

Q If it appears that the documents were not delivered wouldn't it persuade you that this arrangement was not made in the particular case?

A No, because I would accept the draft and then make the arrangements and then go over to the office and hand it over to the shipping clerk.

Q So that the only thing that was done was that you would sign this letter?

A Yes.

Q And then you would have a sort of an oral talk with the manager?

A Yes.

Q Then you would proceed to go and sell the flour?

A Sell the flour and turn the money in to the bank.

Q You would take the flour out of the warehouse of Clarkson & Company, shipping agents?

A Yes.

Q Not Clarkson & Company, Importers?

A No, Clarkson & Company, Importers.

Q How did the flour get from the warehouse of Clarkson & Company, agents of the steamboat, into the warehouse of Clarkson & Company, Importers.

A By Clarkson & Company.

Q Clarkson would simply shift it from one to the other?

A Yes sir.

Q At the time that Clarkson & Company, steamship agents, shifted it into the hands of Clarkson & Company, importers, was any document turned over?

A Not in this case, they were in the hands of the bank.

Q In the hands of the bank?

A In the hands of the bank.

Q So that Clarkson & Company delivered the flour to Clarkson & Company, importers, without the surrender of bill of lading, didn't they?

A Yes, in that case they did.

Q Didn't you know that the bill of lading said that the goods should only be surrendered when the bill of lading was given up?

A Didn't I know that what?

Q Didn't you know that the bill of lading states that the goods are not to be surrendered by the steamship company until the bill of lading is given up?

A Yes, the draft reads documents against payment.

Q No, what I am asking now is about the bill of lading. Don't you know that this bill of lading states that the steamship company will not surrender the goods until the document with the bill of lading is given up?

A I never noticed it particularly.

Q Yet it is a fact, however, that you, as the agent of the steamship company, did put this flour into Clarkson & Company, importers, warehouse, without the production of the bill of lading?

A With the consent of the bank.

Q No, I am not asking that. Without production of the bill of lading?

A Without the bill of lading in that case.

Q Without the bill of lading at all. You say this draft was accepted when?

A It was accepted—I am not positive, but between the—somewhere between the 17th and the 25th, I should say.

Q Of January, 1904?

A Yes. It was while the boat was being unloaded or just after it had been unloaded, I would say.

Q I think the evidence shows that the boat reached there about the 16th of February. About what time, then, would you say that this flour was fully discharged?—I mean January?

A 16th of January.

Q What time was this flour fully discharged from the "Hyades"?

A Well, it would take probably a week or ten days to discharge.

Q So that it would have been fully discharged on or about the 26th?

A Somewhere around there, sir.

Q I call your attention to the fact that the "Hyades" left Port Arthur on January 22nd?

A 22nd. Well, that may be.

Q So that it would have been fully discharged at that time?

A It would have been discharged, yes.

Q Now, how long after the flour was taken out of the boat was it that you took it out of your warehouse and proceeded to sell it to other people?

A Well, it would be after the old flour which we had in the go-down had been sold.

Q Have you any idea when that was?

A No, I have not.

Q Have you any idea whether any of this flour was ever sold by Clarkson & Company—this “Hyades” flour?

A No, I would say that there had been sold to people up to the time I left Clarkson probably eight to ten thousand bags of flour.

Q Eight or ten thousand bags?

A Yes, that is, from the date of the arrival of that boat.

Q So that the remainder of it, which would be about twenty-five to twenty-six thousand bags, was still in the warehouse, was it?

A Well, I figure that there would be probably from twenty-five to thirty thousand bags remained in the warehouse.

Q Still in the warehouse. If it should appear that this draft did not reach Port Arthur until January 22nd, the day the boat left, and that it was not accepted until January 30th, would that make any difference in your testimony?

A Well, I might be mistaken in the date, I can't say exactly, you see.

Q The situation in which you left this employment and the subsequent war were very exciting times, weren't they?

A They were.

Q And you don't pretend, do you, now, to tell the jury that your recollection is perfectly fresh and clear about all these transactions?

A No, I am only telling you, after giving the thing a good deal of study and thought, working it out as near as possible.

Q You have been thinking over what the facts were and your testimony in this case for a long time, haven't you?

A Going through the evidence, and from what I know.

Q That is, you were down here in Seattle about say two years ago perhaps?



A Two years ago.

Q Two years ago. Now, to whom, if you know, did Clarkson & Company sell that 8,000 sacks of flour?

A Oh, to—it was sold through the Comprador to various Chinese and to—possibly to Russians or foreigners in the port.

Q Was it paid for?

A No. The cargo was—that that was sold to the Chinese Comprador was charged to the Comprador and he collected in from his customers and paid in to the firm of Clarkson & Company.

Q And he did pay it in, did he, to Clarkson & Company?

A Not all.

Q Well, how much did he pay?

A The Comprador always had outstanding probably from twenty to thirty thousand rubles.

Q But I ask you to be specific about this particular consignment. How much, if you know, did the Comprador pay on this 8,000 sacks of flour which you say were sold out of this flour?

A Well, probably nothing.

Q Probably nothing?

A Probably nothing. I can't state that.

Q Now, of your own knowledge, Mr. Short, can you positively state that you know whether any of this flour from the "Hyades" was sold while you were there?

A From the "Hyades"?

Q Yes.

A I can—no, I can't.

Q You cannot?

A I cannot state positively—the "Hyades."

Q (Mr. McCord) What was that question?

A If I state positively that any of the flour from the "Hyades" was actually sold up to the time I left.

Q (Mr. Gregory) The facts were that there was a great deal of flour in the warehouse, was there not?

A There was from six to eight thousand sacks, I figure.

Q And whether or not the 8,000 sacks that you say were sold was a part of the "Hyades" flour or not you have no knowledge, have you?

A I have no knowledge.

Q No, no knowledge at all, and you are not able to state now here, are you, whether or not those 8,000 sacks were paid for or were sold?

A Well, I would say that up to the time I left there they were not paid for.

Q Yes, they were not paid for.

A In fact I am positive, because it was sold through the Comprador or through the general accounts, which would not have been collectible in the—with the general accounts until the first of the following month and with the Chinese just as he collected it in from the Chinese who were sub-contractors building the forts and roads.

Q Do you know whatever became of the “Hyades” flour?

A The “Hyades” flour?

Q Yes.

A I don’t.

Q Do you know whatever became of a single sack of it?

A No, nothing other than what I have heard them testify to.

Q Yes, but of your own knowledge, I mean?

A No.

Q You don’t know anything about that at all?

A I know that was in the warehouse of Clarkson & Company.

Q Whether or not it was ever delivered out of the warehouse to anybody you can’t say?

A I cannot say.

Q Whether or not the bank ever got any money for the draft you cannot say?

A No, I cannot say.

Q Yes.

A I don’t know.

Q Now, concerning the ship “Pleiades”, when did she get into Port Arthur?

A She got in there on the 7th, I think; I won’t be positive to the date.

Q Of February. You have heard read the deposition here

of Mr. Davidson, concerning a certain vessel which got in there, have you not?

A Well, I heard in reference to two, I think, the boat—do you refer to the boat with the flour?

Q The boat with the flour.

A Well, that was about the 7th; it may have been the night of the 6th.

Q Was Mr. Davidson, in his testimony there, referring to the steamer "Hyades" or the steamer "Pleiades"?

A He was referring to the steamer "Pleiades."

Q Yes. His testimony had nothing whatever to do, had it, so far as the flour was concerned, with the ship "Hyades," so far as you know?

A Well, as far as I know. I don't know what his mind was. It is eight years ago and Davidson may have been—

Q (Interrupting) The part of his testimony regarding the fact that it was just before the war, that he had to get the assistance of the Russo-Chinese Bank to visit the Admiral so that they could get the boat out of there, and that some of it was landed in go-downs and on the foreshore—all of those transactions took place with reference to the "Pleiades," didn't they?

A The "Pleiades," yes.

Q Now, at the time that the "Hyades" was in Port Arthur there was no war, was there?

A There was no war.

Q And there was not any in view, was there?

A No, we had no thought—we had heard every little while war rumors, but there was absolutely no excitement or no expectation of war on the day of the 7th or the day of the 8th.

Q Do you know of any reason that on the 30th day of January or the 22nd day of January, 1904, the suspicions of the Russo-Chinese Bank concerning Clarkson should have been aroused more than they were or should have been theretofore?

A The suspicions of the Russo-Chinese Bank concerning Clarkson, I don't see why there should have been any. Clarkson was in—as far as his Port Arthur branch was concerned was in a better financial standing that it had been for a long time.

Q So far as you know, then, there was no reason why the Russo-Chinese Bank should not have assumed that Clarkson would pay these drafts when they became matured?

A Absolutely none.

Q So far as you know, there was no reason that the Russo-Chinese Bank should notify Seattle that there was anything unusual in this transaction, was there?

A Not that I know of.

Q Not that you know of?

A Not that I know of.

Q And you know of no reason why any custom or usage prevailing at Port Arthur would have compelled the Russo-Chinese Bank to telegraph or write Seattle, do you?

A No, I don't.

Q You don't?

A No. The bank may have had some inkling of war, that I may not have known.

Q But of course it was known all over the world that there was war imminent, was it not?

A Well, we knew less about it in Port Arthur than probably anywhere else.

Q About how large a city was Port Arthur then?

A There was from forty to fifty thousand Russian troops there; there was probably 4,000 civilians, and anywhere from fifty to a hundred thousand Chinese.

Q So that there were nearly 200,000 people there?

A Yes.

Q It was a large city at that time?

A It was a large place.

Q And at that time there was a great deal of business going on, was there not?

A A great deal of business going *in*. ....

Q And there were many ships—

A (Interrupting) Well, no, there were not, not just at that time.

Q Not just at that time, but Port Arthur at that time was a port of very considerable magnitude, was it not?

A It was.

Q Do you know how many warehouses there were in the city?

A Well, there was Ginsburg, Clarkson, and the Chinese Eastern Railway Seagoing Service.

Q How far away were they removed from Clarkson's warehouse?

A Ginsburg's was about one hundred yards; the Seagoing Service was probably five hundred yards.

Q Did Clarkson & Company have a separate warehouse for its business as steamboat agent and for its business as importer?

A No.

Q They landed the goods, did they, in the same warehouse?

A In the same warehouse.

Q And thereupon Clarkson & Company, not as agents of the steamboat, but as importers, or personally made this arrangement that you speak of with the Russo-Chinese Bank?

A As importers.

Q As importers?

A Yes.

Q Did the question ever come up as to whether or not Clarkson & Company were not responsible as the agents of the steamboat for letting these goods go without a bill of lading?

A Not to my knowledge.

Q You never thought or considered that at all?

A Just give me that question again, will you please (Last two questions read).

Q (Mr. Gregory) What is the answer, please?

A As far as the liability of Clarkson & Company for delivering goods without a bill of lading, that was understood by both Davidson and myself, that if we delivered goods without the consent of the bank, that we were liable to a trip to Sagalin.

Q What do you mean by that—penitentiary?

A Well, that it was a criminal offense to take the goods without the consent of the bank.

Q But you were willing to take, were you, an oral consent without any writing at all?

A Yes, we were. The bank officials were responsible people.

Q Yes.

A And the bank knew at all times that we had sufficient money in sight, or cargo in sight, to cover them.

Q Did you carry a set of books for Clarkson & Company as agents of the steamship and also for Clarkson & Company as importers?

Q No.

Q Carried same books?

A Same books.

Q Did you make any transfer in your books or any books when you took the flour from the possession of Clarkson & Company, agent of the boat, and transferred it to Clarkson & Company, importers?

A No.

Q Nothing of the kind took place upon your books?

A Nothing at all. The only entries made on the books was that the Centennial Mill Company was credited with the amount of their invoice and when that money was paid into the bank and matured with the draft that money was charged up against that account.

Q I will call your attention to the fact that Mr. Davidson has testified that this arrangement of which you speak was done upon the acceptance of the draft and by delivery of the documents. Do you agree with him in that respect?

A Not in all cases.

Q Not in all cases. It was usual, was it not, to deliver the bills of lading?

A It was the proper thing to get the bill of lading, I suppose.

Q Yes. Why didn't you do it in this case?

A Well, everything at Port Arthur, and particularly at the bank, was done in somewhat of a slack way. You would go to the Russo-Chinese Bank and you would probably find around the man in charge of the drafts—you probably would find that there was fifty or a hundred Chinese there buying drafts or getting drafts, with bills of lading, and you could not wait all day to arrange all those details.

Q And you were satisfied, were you, with all that hurly burly and people around, to simply get word from the bank



official, that that was complete justification for your taking all this flour out of your warehouse and selling it, although you knew that it was secured by a bill of lading; is that so?

A On the word of the manager of the bank I was perfectly satisfied.

Q State just what took place between you, just repeat, as nearly as you can, the language between you and the manager of the bank on this occasion?

A Well, the same as any general occasion—go to him with the draft—go to him and tell him that this draft was there with a bill of lading attached and that you wanted it released and—

Q (Interrupting) Did that take place in this case?

A It took place in all of those cases where the bills of lading were attached to the draft.

Q Please be specific. Did it take place in the case of the ship "Hyades"?

A Yes.

Q You are positive of that, are you?

A I am positive.

Q And do you know the exact date?

A No, I can't tell you to one day; it is a long time back.

Q And what would the official say—of the bank?

A What would the official say?

Q Yes.

A He would accept the letter of guaranty, and that is all.

Q Did he write nothing at all?

A No, nothing was written at all?

Q He would simply wink his eye or say "All right" or something to that effect.

A I didn't pay particular attention to that winking of his eye.

Q But you did know that he said something?

A Yes.

Q And that was—

A (Interrupted) It was all right and we took the cargo.

Q And you thought that was all that was necessary?

A That was all that was necessary. The bank was always aware of the fact that we took the cargo, and up to six months or nine months before Clarkson moved to his own go-down he

was taking that cargo out of the bank's go-down and the bank had their own man looking into that warehouse four and five and six times a day, so they knew exactly what was going on.

Q Was the draft in the bank at the time you went there?

A The draft in the bank at the time—certainly.

Q Sure of that?

A I am positive.

Q Do you know when the draft got there?

A The draft got there, if I am not mistaken, a couple of days before the boat.

Q I call your attention—

A (Interrupting) But I am not positive as to that. Very often the draft and bill of lading would arrive in Port Arthur two or three weeks before the steamer, and other cases the steamer would arrive in port before the documents.

Q You would not go to see the official of the bank, would you, until after the goods had been landed?

A Not unless we wanted to sell flour off the boat.

Q Unless you wanted to sell it right off the boat?

A You see we had to—according to the Russian law I suppose of banking—the drafts were supposed to be accepted within forty-eight hours after arrival.

Q Yes.

A (Mr. McCord) After arrival of what?

Q After arrival of the cargo.

Q (Mr. Gregory) You didn't accept this draft, did you, within forty-eight hours after the arrival of the cargo?

A I can't tell you to a minute or to a day exactly when I accepted it.

Q You have no specific recollection, have you, of the time when you accepted this draft?

A No, I should say it was somewhere around or about—running to the 25th, somewhere around there; I am not positive, I can't be positive.

Q No. And isn't it a fact, Mr. Short, that your testimony here is based very largely upon your general custom or practice there and not on any specific memory that you have of the special draft of \$36,000?

A No, it is not.

Q You distinctly recall the fact—

A (Interrupting) I distinctly recall the steamboat "Hyades" and that of the "Pleiades."

Q I call your attention to the following statement by Mr. Friedberg: "We categorically deny—"

MR. McCORD: (Interrupting) Is that in evidence?

MR. GREGORY: No. I am intending to ask him if this statement of Friedberg is correct

Q (Mr. Gregory) "We categorically deny that the Port Arthur branch ever got a letter of guaranty for the value of the flour which arrived by the steamer 'Hyades,' but the goods and documents, together with the draft for \$36,194.80, were from the 31st to 13th April, 1904, in Port Arthur." Is that statement true?

A No. Let me tell you that Mr. Friedberg was not the manager of the bank and not the man in authority there at that time.

Q He was there then when?

A He was in the employ of the Russo-Chinese Bank but he had no authority, or at least I never could get any authority from him.

Q But the fact is that if Mr. Friedberg did make that statement he is incorrect, is it?

A Yes, to the best of my knowledge and belief he is.

Q You are positive about that, are you not?

A Yes, I am positive about it.

Q Well, that is what you have been testifying to entirely here.

A Yes, I am positive.

Q Sure-gun?

A I am sure-gun.

Q I will ask you if you know anything about an arrangement between the bank and Clarkson & Company concerning documents which may have been sent over to Harbin?

A Concerning documents which might have been sent to Harbin? No, I don't.

Q You don't?

A I don't.

Q Didn't you know or do you know that on account of the

conditions in Port Arthur, that the bank had transferred some of its valuables and documents to Harbin?

A I don't know. The only thing I know is that that Ofsvankin, the manager of the bank, transferred himself to my house when I left.

Q He did?

A Yes, to live in my house when I went away.

Q How long did you remain in Port Arthur?

A I stayed there—I went away on the “Pleiades,” which was—I don't know, somewhere around the 15th.

Q 15th of February.

A Yes.

Q Have you ever been back in Port Arthur?

A Not yet—not since.

Q You were there then during the first days of the siege?

A I was, yes.

Q And do you know whether or not the bank building was struck by any shells?

A It was not.

Q Either of the bank buildings?

A No.

Q Do you recall the fact that the bank moved its property from the old bank building down to the new bank building?

A The bank had not moved up to the time I left.

Q So that you don't know whether they moved or not?

A No. I might say that the first bombardment on the day of the 9th a shell struck on the foreshore midway between the Russo-Chinese Bank and Clarkson's warehouse, which shattered all the windows of all the buildings around that part, but there was no shell that struck the bank.

Q But it was a very hot bombardment, of course?

A Oh, it sure was. There was no pleasure to be in it.

Q I agree with you in that respect at least.

A Well, that is good.

Q You don't know whether the Japanese confiscated any of this flour that was left in Clarkson's warehouse?

A No, I don't know.

Q Isn't it a fact that a part of the flour which was on the “pleiades” was landed there?

A I would say that there was not more than from 1,500 to 2,000 bags landed from that boat.

Q Is it not a fact—

A (Interrupting) And it was not—

Q (Interrupting) Was not some of the flour placed upon lighters and these lighters were carried out to sea?

A It was impossible for lighters to be carried out to sea.

Q You say that is not true?

A That is not true; that could not be.

Q And isn't it a fact also that the Russians confiscated about eight or ten thousand sacks?

A I don't believe it; in fact I know it; no.

Q You don't believe that is true at all?

A No, I don't.

Q It was then taken over to Dalny, was it?

A It was taken over to Che-fu.

Q Did Clarkson & Company have a warehouse there?

A No.

Q Didn't they have a warehouse at Che-fu?

A No sir, not at Che-fu.

Q Where was it placed at Che-fu?

A It was put in a warehouse of Cornaby-Eckford & Company.

Q Did Clarkson & Company have a warehouse at Dalny?

A They had a warehouse at Dalny.

Q Did the Russo-Chinese Bank have any agency there?

A In Dalny, yes.

Q Also?

A Also, yes. Mr. .... I would just like to hand Mr. Gregory this letter, if I might, to show that I resigned from Clarkson, and the date (handing paper to counsel).

Q That is not a matter I am concerned in.

A No, but it is just a matter of the date that I pulled out from Clarkson & Company.

Q Yes sir. Do you recall the fact of Mr. Ostrander being present there in Port Arthur?

A Ostrander, yes.

Q You were with him possibly—

A (Interrupting) I saw Ostrander there, yes.

Q And he was in and out of your warehouse?

A He was in and out of the office.

Q Did he know of this arrangement with the bank?

A I don't really know. I don't remember.

Q Didn't he see that you were delivering this flour from time to time?

A Oh, he could not help but see the flour was going out from time to time.

Q Going out all the time?

A Yes. I don't remember that Ostrander—

MR. McCORD: (Interrupting) I object to this as immaterial, irrelevant and incompetent, and I move to strike out what he has said about Mr. Ostrander.

THE COURT: I deny the motion.

Q (Mr. Gregory) Continue the answer.

A (Continuing) —that Ostrander went into the go-down.

Q Mr. Ostrander made frequently visits to Port Arthur, did he not?

A Yes, Ostrander was there on several occasions.

Q This practice that you speak of had been continuing for some years, had it, regarding the bank and Clarkson & Company?

A Yes.

Q Mr. Ostrander must have known, must he not, coming in and going out all the time, about it?

A Well, I don't know. I never had a great deal to do with Ostrander. He was with Davidson more.

Q Mr. Ostrander of course knew all about the fact that you were representing the steamboat company?

A I presume he did. I don't know.

Q That was a fact well known in Port Arthur, was it not?

A Yes, it could not help but be known, because—

Q (Interrupting) Did you ever have any correspondence with the defendant bank, the bank of Commerce?

A No sir.

Q You have had no letters with them at all concerning any of these matters?

A No, no.



## REDIRECT EXAMINATION.

Q (Mr. McCord) Mr. Short, what became of this letter of guaranty after you signed it on behalf of Clarkson & Company?

A Well, I don't know. The Bank—

Q (Interrupting) Who did you give it to?

A The manager of the bank, they took it.

Q Who was Friedberg?

A Friedberg was—oh, I don't know what you would call him, he—

Q (Interrupting) What did he do?

A Well, he sat around the bank and he signed the drafts—two signatures to a draft—Friedberg with a man named Pavloff.

Q Was there anybody that had charge of the shipping and arrival of the goods coming over on steamships and so on?

A There was a man by the name of Neigabaur, I think it was, Neigabaur; that is the man that had charge of the shipping—bank shipping. They very often had a tramp steamer consigned to the bank.

Q And who was the other manager besides Ofsvankin?

A Ofsvankin was the manager of the bank.

Q Well, who was next in authority to him?

A Well, that would be perhaps Friedberg or Pavloff. Previous to that it was Moss.

Q Where is Mr. Ofsvankin now?

A I don't know.

Q Wasn't there some other man there?

A Some other manager? There was Mr. Berg, a director of the Russo-Chinese Bank from St. Petersburg, and a Mr. Dard, were both in Port Arthur for—oh, six or nine months trying to straighten up the—

Q (Interrupting) When?

A What?

Q I say, with reference to the time you left Port Arthur how long had they been there before that?

A Oh, they had been there for six or eight months, at least Berg had. Dard had been there and gone back.

Q Was Mr. Berg there when you left?

A I don't remember exactly.

Q What has become of Ofsvankin now?

A From somebody's deposition I saw he was manager of the bank in Vladivostok.

Q He is not one of the witnesses who have testified here?

A No, he has not testified. He was the manager of the bank and has not testified.

Q Counsel asked you something about the quantity of flour that was on hand after the arrival of the "Hyades" flour. That was thirty-six thousand and some odd bags, was it not? And you said there were how many then, eight or ten thousand, six or eight thousand?

A About from six to eight thousand bags; I can't say definitely.

Q Well then there was forty-two to forty-four thousand sacks in the warehouse?

A About that.

Q And you think that at the time you left Port Arthur there had been eight or ten thousand sold?

A I would figure from eight to ten thousand bags. I can't say definitely.

Q That still leaves about thirty-two to thirty-four thousand?

A Somewhere around there, more or less; I can't say.

Q Now, in regard to the Comprador who bought this flour, how did they make their payments—how frequently?

A The Comprador, he made his payments to Clarkson & Company as soon as the Chinese sub-contractors on the forts and roads would pay the money to him, which was probably every—some every ten days, some every two weeks, and there was always outstanding twenty to thirty—

Q (Interrupted) Were those accounts good?

A Absolutely good.

Q I believe in answer to one of Mr. Gregory's questions you stated that when you made the arrangement with the bank you immediately credited the Centennial Mill Company with the amount of the invoice?

A With the amount of the invoice.

Q Was that done in this case?

A It was done in every case, that is, up to the—

Q (Interrupting) That was done before or after this letter of guaranty was signed.

A Well, that is done—the invoice is put on file and on the first of the month it was, with other invoices, papers—was credited up to the people from whom we bought goods.

Q But at the time the letter of guaranty was signed I understood you to say that you had credited the Centennial Mill Company at that time; is that right?

A Well, within—at the time or within a day or so. Those invoices were received and were credited up to the parties, and then when the drafts were paid the money was charged to them.

Q Counsel asked you if you were willing to take chances on violating the law without having any written consent. What were your relations with Ofsvankin?

A Very friendly.

Q What kind of a man was he?

A A very, very fine man.

Q I presume that you thought when they gave you their consent that was all right?

A I had every confidence in Ofsvankin, and I think he had in us.

#### RE CROSS EXAMINATION.

Q (Mr. Gregory) I desire to ask you, Mr. Short, one or two other questions. I will call your attention to the testimony of Mr. David M. Clarkson, of your firm, in which he says: "Our custom was that the goods should be turned over only on the presentation of the documents." Your testimony differs from that somewhat, does it not?

A What is that he says, sir?

Q "Our custom was that the goods should be turned over only on presentation of the documents."

A I presume he refers there to people who came to Clarkson & Company's office to obtain goods.

Q Yes.

A They would have to present the bill of lading or a letter of guaranty, or at least a letter of guaranty by the bank, for

the amount, before they would get delivery. These bills of lading were taken up by the shipping clerk in Clarkson's office and at different periods forwarded to different steamship companies as they required these bills of lading.

Q Do you recall the receipt of a letter dated July 18th, 1903, from Mr. Clarkson, addressed to your firm at Port Arthur, in which he calls attention to the fact that you had been allowing goods to be gotten out of the warehouse without the production of documents?

A No, I don't. I have studied that and I can't place it at all.

Q You don't remember anything about that?

A I don't remember at all.

Q And you don't remember anything about the fact that he mentions—the case of Guntz & Albers, allowing it to be done?

A No, I don't. Guntz & Albers is a very large—probably the largest trading house in the Far East.

Q I call your attention to the fact that Mr. Clarkson says in the letter "Mr. Davidson and Mr. Short both mentioned the fact that as Guntz & Albers gave goods on the firm's letter of guaranty, without the bank's endorsement, they considered they must do the same." You don't recall that?

A I don't recall that, but I would say that if Guntz & Albers came to me with a letter of guaranty to deliver their bill of lading as soon as they received it, that I would let them have it in those cases, because they—

Q (Interrupting) Without any letter from the bank at all?

A In small amounts.

Q In small amounts?

A Yes, because they are very reliable and a very large house.

Q If any large and reliable house came to you, you would permit them to take goods whether they had the bill of lading or not?

A If it was a moderately small affair, not a large order.

Q In other words, the production of these bills of lading

was not considered by Clarkson & Company a very essential matter so far as small shipments at least were concerned?

A Not for a little trifling thing, but with large ones it was.

### REDIRECT EXAMINATION

Q (Mr. McCord) You said a while ago that the documents were often kept by the bank. How frequently would you gather up the documents after the drafts had been—

A (Interrupting) Well, the shipping clerk had charge of that and was supposed to send those bills of lading to the different steamship companies at different intervals, no set time for it.

Q Did you get more than one at a time?

A More than one—

Q (Interrupting) After you had sold the flour, I say, did you—when the guaranty was signed you said sometimes you left it and sometimes you did not.

A Well, whenever the draft was paid we always got it.

(Witness excused.)

### WILLIAM STEWART DAVIDSON

(Sworn by American Consul-General at Shanghai, China)

#### INTERROGATORY NO. 1

Q What is your name?

A William Stewart Davidson.

#### INTERROGATORY NO. 2

Q Where do you reside?

A In the city of Shanghai, China, at No. 10 Canton Road.

#### INTERROGATORY NO. 3

Q What is your occupation?

A I am a director in the firm of J. A. Wattie & Company, Limited.

#### INTERROGATORY NO. 4

Q How long have you resided in Shanghai?

A Since 1904.

#### INTERROGATORY NO. 5

Q Where did you reside during the year 1903?

A During the year 1903 I resided at Port Arthur, North China.

## INTERROGATORY NO. 6

Q What was your business during that time?

A I was manager of the firm of Clarkson & Company.

## INTERROGATORY NO. 7

Q How long did you occupy that position?

A From April, 1900.

## INTERROGATORY NO. 8

Q What power of attorney did you have as manager?

A I had the fullest power of attorney that was possible to give under Russian law.

## INTERROGATORY NO. 9

Q This power of attorney was renewed each year?

A Yes, sir; each year.

## INTERROGATORY NO. 10

Q What was the nature of the business of Clarkson & Company?

A They were importers, stevedores, commission agents, shipping agents and agents of fire insurance companies. They did a general business of that character.

## INTERROGATORY NO. 11

Q Did Clarkson & Company control any warehouses in Port Arthur?

A Clarkson & Company owned two warehouses in Port Arthur.

## INTERROGATORY NO. 12

Q Who were the agents at Port Arthur for the Boston Steamship Company and the Boston Towboat Company?

A Clarkson & Company.

## INTERROGATORY NO 13

Q With whom did Clarkson & Company do their banking business in Port Arthur?

A The Russo-Chinese Bank.

## INTERROGATORY NO. 14

Q What was the volume of the business of Clarkson & Company with the Russo-Chinese Bank?

A Well, it is impossible for me to give exact figures. The only thing I can say is that they operated on an extensive basis.



## INTERROGATORY NO. 15

Q How long have you lived in the Orient?

A Over fourteen years.

## INTERROGATORY NO. 16

Q Before taking charge of Clarkson & Company's business in Port Arthur, where did you reside in the Orient?

A Immediately before I went to Port Arthur I lived in Vladivostok, and previous to that in Yokohama.

## INTERROGATORY NO. 17

Q How long were you in Vladivostok and what was your business there?

A I went to Vladivostok as a permanent resident. I arrived in Vladivostok and immediately took up a permanent residence on the 4th of July, 1898, and joined the firm of Clarkson & Company as manager of the engineering department and remained in that position until September, 1899, when I went on a trip to Europe and America for Clarkson & Company, and returned to Vladivostok March, 1900, when I was asked by the head of the firm to take charge of the office in Port Arthur for a few months.

## INTERROGATORY NO. 18

Q In what capacity?

A As manager of the engineering department of Clarkson & Company.

## INTERROGATORY NO. 19

Q Are you familiar with the customs and methods of bankers in dealing with importers in the Orient?

A Yes sir.

## INTERROGATORY NO. 20

Q What is the custom of bankers with reference to presenting drafts for acceptance?"

MR. GREGORY: Now, may it please the court, we desire to object to that question as incompetent, irrelevant and immaterial, upon two grounds: First, that there is no reason for the court to now invoke any custom or usage, because the contract in this case is clear and specific and direct; in other words, there is no necessity for an implied contract, because there is an express one; and upon the second ground that the

question does not refer to the conditions prevailing in this case, because it does not ask with reference to presenting drafts for acceptance which are sent as against payment, but it asks generally as to drafts for acceptance. Now, of course there may be one custom of bankers concerning one sort of a draft and another concerning the other kind of a draft, but to invoke now a custom generally and say that it applies to this case is, we submit, utterly incompetent, irrelevant and immaterial.

THE COURT: I overrule the objection.

MR. GREGORY: Note an exception.

THE COURT: Exception allowed.

A As soon as the bank receives the draft it is customary for them to request the drawee to accept it, either by asking the drawee to come to the bank or sending it around to his office.

#### INTERROGATORY NO. 21

Q What is the established custom among bankers at Oriental ports with reference to the handling of drafts with bills of lading and documents attached, when the drafts are in their hands for collection?"

MR. GREGORY: Your Honor will allow me the same objection as that made to the previous one, and the third point that it is not pleaded in the pleadings.

THE COURT: The objection is overruled.

MR. GREGORY: Exception.

THE COURT: Exception allowed.

"A The established custom among bankers in the Orient is not to part with the documents until the drafts have been paid, if the documents are only deliverable against payment. It often happens, however, that the firm upon which the draft is drawn has a good credit with the bank and under those circumstances the bank delivers the documents against acceptance and thereby accepts responsibility."

MR. GREGORY: We ask that last portion of the answer, to-wit, beginning with "It often happens" go out, as not responsive to the question.

THE COURT: The motion is denied.

MR. GREGORY: Note an exception.

THE COURT: Exception allowed.

## "INTERROGATORY NO. 22

Q What is the custom of the Russo-Chinese Bank upon the arrival of shipments where drafts with bills of lading are attached are in their hands for collection?"

MR. GREGORY: We object to any evidence of this custom on the grounds previously stated and upon the further ground that there is no pleading whatever here concerning this matter, therefore it is incompetent, irrelevant and immaterial. There is no statement in the question as to the character of the draft referred to, whether it was a draft as against acceptance or whether it was a draft as against payment. For example, the question is this, Your Honor: "What is the custom of the Russo-Chinese Bank upon the arrival of shipments where drafts with bills of lading are attached are in their hands for collection?" Now there are two kinds of drafts. One is a draft which authorizes them to turn the bill of lading over when it is accepted; that is one thing. The other is where the draft says they shall retain the bills of lading until it is paid; that is another thing. But now this question is asked and the answer is made as if it were a general statement.

THE COURT: I allowed Mr. Spencer to testify about custom. The word "custom" is confusing as a legal term, because in law a custom is a species of law. I would not have allowed Mr. Spencer to be interrogated about special customs that take the place of statutes unless it was a custom that was pleaded. I understand these questions to be in the same line as the testimony of Mr. Spencer, to enlighten the jury as to the course of business—the ordinary course of business, not to change the rights of the parties by a peculiar custom that changes the law, but simply to show the jury what the usual and ordinary course of business is. Being across the water, they may have practices there that would be unusual here, and whatever the practice is I think we are entitled to know by the testimony of witnesses who can tell us.

MR. GREGORY: I do not want to seem unduly insistent, Your Honor, and therefore I shall not further take up the time of the court and jury with this matter, because we have our exception, but I simply wish to again assert that I don't think that counsel can find any authority which says that

where there is a precise contract expressed as there was here, that custom of usage can ever be invoked, when that contract is not ambiguous. That is my understanding of the law.

THE COURT: I will give an instruction like that to the jury in this case.

MR. GREGORY: Then, if Your Honor please, if that is so, and the contract in this case is not ambiguous but is precise, the testimony is not admissible.

THE COURT: It may go in as a part of the *res gestae*—of the circumstances of the transaction.

MR. GREGORY: Note an exception.

THE COURT: Exception allowed.

“A The custom of the Russo-Chinese Bank at Port Arthur was to see that the cargo was stored and insured and the managers of the Russo-Chinese Bank have frequently come to the office of Clarkson & Company to ascertain if certain cargo was properly stored and have taken out fire insurance with some of the fire insurance companies for which Clarkson & Company acted as agents, on such cargo.”

MR. GREGORY: We ask now, first, that the answer go out as incompetent, irrelevant and immaterial—the entire answer, and then we specifically ask that that portion of the answer which begins with the words “and the managers of the Russo-Chinese Bank have frequently come to the office of Clarkson & Company” down to the end of the sentence be stricken out as not responsive to the question and as being no evidence of a custom.

MR. McCORD: It is clearly responsive to the question.

THE COURT: The motion to strike is denied.

MR. GREGORY: We note an exception.

#### “INTERROGATORY NO. 23

Q In transactions taking place between the firm of Clarkson & Company at Port Arthur and the branch of the Russo-Chinese Bank at Port Arthur, were these customs strictly observed?”

MR. GREGORY: May it please the court, we have an additional objection to make to this question. We object to it upon the same grounds as previously made and upon this additional ground, that there is no pleading whatever here

to the effect that there was a practice between these parties to disregard the other custom, and, furthermore, that the matter is absurd upon the face of it because they now allege in one place that the custom was not to part with the goods until they were paid, and now proceeds to state that the practice was to do that thing. Now, just as soon as you have the practice the custom ceases. In other words, it could not be the custom between the parties when they continually violate it, the two matters cannot stand together. The question, therefore, Your Honor, is this way, they first of all ask what the general custom is; that is answered, and then says "What was the practice?" He says this was directly opposite to the custom, therefore it negatives the custom, one fights the other. You can't have two customs antagonistic existing at the same time. Now we feel, very strongly, Your Honor, that this is utterly irrelevant and incompetent, but I assume Your Honor will rule the same as before.

THE COURT: You may as well argue to me that if the witness says one thing and then contradicts it that he should not be allowed to say it. Now it is for the jury to consider your argument here that one statement contradicts the other.

MR. GREGORY: No, Your Honor, perhaps I didn't make my point clear.

THE COURT: Yes, I think you did.

MR. GREGORY: What the witness has said is this, not that he is mistaken at all, but he first said "this was the custom" and then in the next breath he says "the practice was this." How can those two things stand together?

MR. McCORD: That is for the jury.

MR. GREGORY: No, it is a question of law, Your Honor.

THE COURT: The jury will handle it, probably.

MR. GREGORY: Well, of course I understand that is Your Honor's decision. I am simply getting my record straight here, Your Honor.

THE COURT: Yes sir, exception allowed.

"A These customs were not strictly observed as the Russo-Chinese Bank at Port Arthur allowed Clarkson & Company to have the bills of lading and other documents attached to the draft before the draft was paid. This only happened I



might say when the amount involved was a considerable amount such as would be the case in flour shipments."

MR. GREGORY: Now we ask that after the word "allowed" to the end of the sentence be struck out as not responsive to the question, and further that it is incompetent, irrelevant and immaterial and not pleaded and being no evidence of a custom or usage.

THE COURT: The motion is denied.

MR. GREGORY: Exception.

THE COURT: Exception allowed.

"INTERROGATORY No. 24.

Q Why would the bank permit this to be done by Clarkson & Company?

MR. GREGORY: We object to this question as incompetent, irrelevant and immaterial and cross examination of his own witness. His witness has stated this fact and he is not obliged to cross examine him to state why it is so.

THE COURT: Objection overruled.

MR. GREGORY: Note an exception.

"A Because the firm of Clarkson & Company was established at the instigation and with the assistance of the Russo-Chinese Bank in Vladivostok in 1897. Mr. Clarkson went to Vladivostok about that time and then *then* managers of the Russo-Chinese Bank at Vladivostok requested him to establish what they called an American firm and the Russo-Chinese Bank found him a Russian partner. Neither Mr. Clarkson or his Russian partner put one cent of capital into the firm. Notwithstanding this the Russo-Chinese Bank opened credits for the firm of Clarkson & Company for a sum of over a million roubles. Towards the end of the year 1898 when the firm of Clarkson & Company had been established one year, roughly speaking, Mr. Clarkson was absent from Vladivostok and I was in charge when the bank, the Russo-Chinese Bank, presented a statement of accounts showing that the firm of Clarkson & Company owed the Russo-Chinese Bank approximately eight hundred thousand roubles. I thereupon looked into matters and particularly the accounting department, with which I had not concerned myself previously, and found that there was absolutely no books showing what credits had been opened



or what sums had been drawn against any particular credit. In other words, there was no means of refuting or corroborating the statement presented by the Russo-Chinese Bank so I could do nothing. Upon Mr. Clarkson's return from Port Arthur the matter was gone into and rather than employ the services of a chartered accountant to go over the books and the transaction in detail, he preferred to accept liability according to the Russo-Chinese Bank's statement for this eight hundred thousand roubles. There were goods in hand representing a value of approximately three hundred to four hundred thousand roubles and therefore there had been a loss on the first year's business of between three hundred and four hundred thousand roubles. Clarkson & Company continued to owe the Russo-Chinese Bank this high sum for many years and it was on account of this debit balance that the bank, the Russo-Chinese Bank, afforded these special facilities for doing business to Clarkson & Company.

MR. GREGORY: We ask that all the portions of that answer following the words "Mr. Clarkson went to Vladivostok" be struck out as not responsive to the question, and, furthermore, that all those portions which pretend to give a history of the bank balance between the two institutions be struck out as not responsive.

THE COURT: The motion to strike is denied.

MR. GREGORY: Note an exception.

"INTERROGATORY No. 25.

Q When Clarkson & Company were allowed to take delivery of the cargo under the circumstances you have described, who held the bills of lading?

A The custom was for the bank, the Russo-Chinese Bank, to deliver the bills of lading to Clarkson & Company when Clarkson & Company accepted the draft.

INTERROGATORY No. 26.

Q For how long was this practice kept up?

A This custom was in practice from the time I took charge of the firm of Clarkson & Company in Port Arthur until I left.

INTERROGATORY No. 27

Q Were there any other banks in Port Arthur?

A No, but the Hongkong & Shanghai Banking Corporation had an agency in Port Arthur.

INTERROGATORY No. 28

Q What was their practice in matters of this kind?

A To my knowledge they never allowed the bills of lading to be surrendered until the draft had been met.

INTERROGATORY No. 29

Q Had the firm of Clarkson & Company at Port Arthur had any business transactions with the Centennial Mill Company at Seattle, Washington?

A Yes, sir.

INTERROGATORY No. 30

Q What was the nature of them?

A Clarkson & Company had bought large quantities of flour from the Centennial Mill Company at Seattle, Washington.

INTERROGATORY No. 31

Q How was the payment for this flour made?

A The Centennial Mill Company drew on Clarkson & Company a ninety day sight draft for the value of shipment with the bill of lading and insurance policy attached to the draft which was to be surrendered against payment.

INTERROGATORY No. 32

Q What was the practice of the Russo-Chinese Bank at Port Arthur in dealing with Clarkson & Company in reference to these shipments from the Centennial Mill Company?"

MR. GREGORY: I make the same objection as to the practice as heretofore made, Your Honor.

THE COURT: Objection overruled.

MR. GREGORY: Exception.

THE COURT: Exception allowed.

"A The Russo-Chinese Bank invariably during my connection with the firm of Clarkson & Company surrendered the bills of lading and other shipping documents on acceptance of the draft. Afterwards upon the sale of flour by Clarkson & Company the proceeds of such sales were put into the Russo-Chinese Bank and when the sums so paid in were large enough it was customary to ask the bank to telegraph the equivalent

of these sums in American currency to America in order to avoid further interest charges.

INTERROGATORY No. 33

Q State fully and in detail the custom between Clarkson & Company and the Russo-Chinese Bank with reference to the handling of flour covered by documents held by the bank?"

MR. GREGORY: We object to this question as incompetent, irrelevant and immaterial, there being no ground shown for the introduction of the custom, and the witness not having been shown to have had any personal knowledge whatever of the particular transaction involved.

THE COURT: The objection is overruled.

MR. GREGORY: Exception.

"And state whether or not the Russo-Chinese Bank consented to the sale of the flour on the "Hyades" by Clarkson & Company prior to the payment of the drafts?"

MR. GREGORY: Same objection. I should have made it at the end of the question.

THE COURT: You will have an exception to my ruling overruling any objection to this line of questions.

"A As soon as the draft reached the Russo-Chinese Bank it was customary for the Russo-Chinese Bank to inform Clarkson & Company of its arrival and then this notification was given by a request from the bank that it should be accepted. The draft usually arrived some time before the goods and it was usual to accept it before the steamer carrying the goods had arrived in port. Upon the arrival of the steamer carrying the goods in port some one in authority from Clarkson & Company would go to the Russo-Chinese Bank and make arrangements to get the documents attached to the draft upon acceptance of the draft and invariably this was accomplished. The Russo-Chinese Bank when surrendering documents before the draft was paid required that a letter of hypothication should be signed by Clarkson & Company. I have no copy nor original of such letter nor do I know where one can be found as all such letters were delivered to the bank, Russo-Chinese Bank, at the time they were signed but I do know that in substance these letters stated that the goods belonged to the Russo-

Chinese Bank and that the consignee agreed to pay to the Russo-Chinese Bank the proceeds of all sales when and as made? On or about the 15th day of February, 1904, the Russo-Chinese Bank did consent to the sale of the flour ex steamship "Hyades," if that is the name of the steamer that arrived at Port Arthur on or about the 8th of February, 1904."

MR. GREGORY: We ask now that that portion of the answer commencing with the words "On or about the 15th of February, 1904, the Russo-Chinese Bank did consent to the sale of the flour ex steamship 'Hyades,' if that is the name of the steamer that arrived at Port Arthur on or about the 8th of February, 1904,"—that that portion of the answer be stricken as not responsive to the question, and, furthermore, that it now appears that this witness does not refer to the steamer "Hyades" at all, which arrived at Port Arthur on January 17th, but to the "Pleiades" which arrived there on February 8th.

MR. McCORD: I think the testimony of the witness further on, Your Honor, explains that he had reference to the "Hyades" flour. I think that will be a question for the jury to pass upon. I say to the court that in my judgment that is what it will show.

THE COURT: The objection is overruled. The jury will understand, however, that this testimony is not relevant unless it is connected up to show the witness was talking about the "Hyades" and not the "Pleiades."

MR. GREGORY: We will take a formal objection and exception.

THE COURT: Exception allowed.

#### "INTERROGATORY No. 34

Q And if you answer that the Russo-Chinese Bank did consent to the sale of the flour included in this "Hyades" shipment prior to the payment of the draft, state how this consent was manifested. Did the Russo-Chinese Bank at the time it gave its consent to the sale of this flour require Clarkson & Company to execute any written instrument recognizing the bank's ownership of the flour and agreeing to account to the Russo-Chinese Bank for the proceeds of the sale of the flour?

A On or about the 15th of February, 1904, I personally notified the at that time manager of the Port Arthur branch of

the Russo-Chinese Bank that I could not get in communication by telegraph with the head office of Clarkson & Company; that I had been ordered to leave Port Arthur by the Russian military authorities and that for these two reasons and as there was no one there I could leave in charge of the affairs of Clarkson & Company I had made arrangements with a Russian firm by the name of Ginsburg & Company to take over the flour and pay the draft, to which arrangement the Russo-Chinese Bank consented, and as I left Port Arthur on the 17th of February, 1904, I do not know whether the bank required Ginsburg & Company to sign a letter of hypothication but assume that they did not in as much as they had doubtless obtained one previously from Clarkson & Company."

MR. GREGORY: We ask that that portion of the answer as follows: "but assume that they did not in as much as they had doubtless obtained one previously from Clarkson & Company" be struck out as hearsay.

THE COURT: Strike it out.

MR. McCORD: No objection.

THE COURT: The jury will understand that that item of evidence has been ruled out by the court.

#### "INTERROGATORY No. 35

Q If you answer that there was a written document required by the bank to be executed by Clarkson & Company, attach to your deposition a copy of such document, if you have one, and if you have not such a copy, then state, if you know, where such a copy of the original document can be found?

A I have not a copy of the letter of hypothication nor do I know where one can be obtained. These letters of hypothication were always handed to the bank.

#### INTERROGATORY No. 36

Q If you have not in your possession or under your control any of the duplicate, originals or copies of documents signed by Clarkson & Company to the bank, permitting Clarkson & Company to sell the flour included in this 'Hyades' shipment prior to the payment of the draft, state the contents of such written instrument fully, give the substance of the agreement that the bank exacted from Clarkson & Company



when the bank gave its consent to Clarkson & Company to sell said flour and to account to the bank for the proceeds thereof?

A I have no original, duplicate original nor copy of such instrument of hypothecation given to the Russo-Chinese Bank by Clarkson & Company and it is impossible for me to remember the exact wording of such letters in use by the bank at that time as nearly eight years have elapsed, but in substance it stated what I have already stated.

INTERROGATORY No. 37

Q If you state that there was such a custom requiring a written instrument to be executed by Clarkson & Company to the bank, state how long this custom had been in force and whether the transaction covering the shipment of the Centennial Mill Company on the 'Hyades' was covered by such custom? In other words, did Clarkson & Company execute such written instrument in case of the shipment in question as in other cases to which you have referred in your deposition?"

MR. GREGORY: Generally we object, Your Honor, upon the same ground as heretofore stated, that there is no room here for custom or practice.

THE COURT: The objection is overruled.

MR. GREGORY: Exception.

"A To the best of my recollection this custom was instituted and inaugurated towards the end of the year 1901 or at the beginning of 1902. It is impossible for me to say positively that the Russo-Chinese Bank required such an instrument for the shipment in question. All that I can say is that it was the custom for the Russo-Chinese Bank to demand such an instrument for all shipments arriving under similar circumstances.

INTERROGATORY No. 38

Q When did the last shipment of flour from the Centennial Mill Company to Clarkson & Company arrive at Port Arthur?

A The last shipment of flour from the Centennial Mill Company to Clarkson & Company at Port Arthur arrived at that port on or about the 8th of February, 1904, but I cannot say positively that I have got the exact date as I was absent from Port Arthur at the time it arrived.



## INTERROGATORY No. 39

Q Where had you been?

A Tientsin.

## INTERROGATORY No. 40

Q On what steamer was this flour brought to Port Arthur?

A On one of the steamers operated by the Boston Steamship Company or the Boston Towboat Company. Either the 'Hyades' or the 'Pleiades.'

## INTERROGATORY No. 41

Q Who were the agents for these steamers?

A Clarkson & Company.

## INTERROGATORY No. 42

Q What was the quantity of flour shipped by this steamer for Clarkson & Company from the Centennial Mill Company?

A Between thirty-five and forty thousand sacks.

## INTERROGATORY No. 43

Q Where was this flour when you arrived?

A Some of it was in the go-downs of Clarkson & Company; some of it was on the foreshore; some of it was still in the lighters, and it is possible that there may have been some of it still undischarged from the steamer.

## INTERROGATORY No. 44

Q Who were the stevedores?

A Clarkson & Company.

## INTERROGATORY No. 45

Q What did you do upon arrival at Port Arthur in reference to this shipment of flour?

MR. GREGORY: I think I ought to object here, may it please Your Honor. It appears now conclusively in this case that this witness is talking entirely about the "Pleiades," because he says he don't know whether it was the "Hyades" or the "Pleiades," but it was the boat that arrived there about February 8th, 1904.

MR. McCORD: Yes, but he said it was the one that brought thirty-five or forty thousand sacks of flour, the exact amount of flour—

MR. DORR: (Interrupting) In every instance he has limited it to the boat that arrived there in February.

MR. GREGORY: February 8th, 1904.

THE COURT: There is a discrepancy in the testimony. It is the business of those twelve men to deal with discrepancies in the testimony.

MR. GREGORY: Where is the discrepancy?

THE COURT: Mr. McCord just stated it, my ears heard it.

MR. GREGORY: I think the evidence shows, without any question at all, that the witness said—

THE COURT: (Interrupting) He said the “Hyades” or the “Pleiades” took thirty-five or forty thousand sacks of flour there.

MR. GREGORY: Yes, we are going to show that this entire testimony and all of this Ginsburg transaction has nothing to do with the “Hyades,” it was the “Pleiades.”

THE COURT: You can show that if you have got the evidence.

MR. McCORD: It is for the jury to pass on that question.

MR. GREGORY: I will ask you now, Mr. McCord, do you claim that the steamer that Davidson is talking about arriving there February 8th, 1904, was the steamer “Hyades”?

MR. McCORD: I claim it was the “Hyades,” the steamer that carried the thirty-five or forty thousand sacks of flour. The “Pleiades,” which arrived there in February and which left on the 13th day of February, never unloaded any flour at Port Arthur except about a thousand sacks.

MR. GREGORY: You claim then, do you, that the steamer “Hyades” was unloading at Port Arthur on February 8th, 1904?

MR. McCORD: No, I don't claim that she was.

MR. GREGORY: What do you claim as to which boat this was?

THE COURT: I overrule your objection. Go on.

MR. GREGORY: You claim it was the “Hyades”?

MR. McCORD: Yes sir, I claim it was the “Hyades” that he is talking about here.

MR. GREGORY: Very well.

“A I was allowed to go on shore at Port Arthur between four and five o'clock in the afternoon of the 9th of February,

1904, and immediately upon my arrival on shore I went to the office of Clarkson & Company and there discovered that the most of my assistants were hiding in their homes and some of them had already ran away to Vladivostok. I was besieged by people who were anxious to get passage away from Port Arthur by the steamers for which Clarkson & Company acted as agents and as soon as I had pacified them and told them there was no possibility of any steamer leaving Port Arthur I looked for the compradore and after a certain time, possibly an hour or more, succeeded in finding him and I then tried to make arrangements with the military and naval authorities to supply watchmen to guard the cargo as all of the employes of Clarkson & Company were absolutely worthless for that purpose. Neither the navy or any army departments would give me any assistance. I finally found two Russian civilians whom I engaged for that purpose. I want to state right here that I saw with my own eyes that afternoon a very considerable quantity of flour being stolen which it was impossible for me to prevent. The whole town was in a chaotic state and the people were, more particularly the Chinese, looting everything in sight.

#### INTERROGATORY No. 46

Q Where were the bills of lading for this shipment of flour?

A I do not know. I have no definite knowledge myself but I presume that the usual custom had been followed and they had been surrendered to Clarkson & Company at the time the draft was accepted."

MR. GREGORY: We ask that the answer commencing with the words "I presume that the usual custom had been followed" be stricken.

MR. McCORD: I do not object to it being stricken—that part of it.

THE COURT: Strike it out. It is a matter of no importance whatever.

#### INTERROGATORY No. 47

Q Do you know who accepted the draft or whether it was accepted?

A I do not but it could have been accepted by either myself or Mr. Czechowitz who acted as cashier for the firm of Clarkson & Company and had power to accept drafts, or by Mr. Short previous to his leaving the firm.

INTERROGATORY No. 48

Q State whether or not Clarkson & Company disposed of any part of that shipment of flour?

A Clarkson & Company entered into an agreement with Ginsburg & Company to sell part of this flour, the actual quantity to be determined when delivery was taken.

INTERROGATORY No. 49

Q What were the terms of sale?

A I cannot remember the exact figures but Ginsburg & Company paid me a certain amount per sack, and the balance, sufficient to meet the draft, was to be paid when the flour was counted. Ginsburg & Company were unable to pay the full value of the flour at that time for the very good reason that the bank being short of funds simply closed its doors and stopped doing business and consequently Ginsburg & Company could not get the money with which to meet payments.

INTERROGATORY No. 50

Q Who were Ginsburg & Company?

A Ginsburg & Company was a very large Russian firm which did a very extensive business with the army and navy department of the Russian Government as well as with the Chinese Eastern Railway Company. The head office of the firm was in Port Arthur and the arrangement I made above referred to in previous answer concerning sale of flour to Ginsburg & Company was with Mr. Ginsburg, the head of the firm of Ginsburg & Company, personally.

INTERROGATORY No. 51

Q Who negotiated this sale on behalf of Clarkson & Company?

A I did.

INTERROGATORY No. 52

Q What were the terms as to delivery?

A There were no particular terms. Ginsburg & Company were handed the keys of the warehouse by me and they agreed

to make payment to the Russo-Chinese Bank against the particular draft as soon as they had counted the flour and as soon as the bank was put in funds.

**INTERROGATORY No. 53**

**Q** Why did you make this sale?

**A** Because as a British subject I was ordered to leave Port Arthur within twenty-four hours on the 10th of February, 1904. Notwithstanding this order to leave I remained in Port Arthur in order to fix up the best I could and to the fullest extent the affairs of Clarkson & Company and I remained there by myself in Port Arthur until the 17th day of February, 1904. During these seven days from the 10th of February to the 17th of February, 1904, I endeavored my utmost to get in communication by telegraph with the head office at Vladivostok but without success. It was impossible for me to delay my departure any longer as other British subjects had been arrested for not leaving when told to do so. There was no one there I could leave in charge of the affairs of Clarkson & Company and the only thing I could do was to close up the offices and endeavor to reach some place from where I could communicate with the head office. I therefore sold the flour at a price which enabled Clarkson & Company to make a reasonable profit, for which approximate profit Ginsburg & Company gave me a draft on Shanghai and the balance of the proceeds of the sale was to be paid by Ginsburg & Company into the bank, the Russo-Chinese Bank, against the draft for the Centennial Mill Company. This arrangement was made known to the Russo-Chinese Bank by me and I believe Mr. Ginsburg accompanied me to the Russo-Chinese Bank when I acquainted them with the terms of this arrangement.

**INTERROGATORY No. 54**

**Q** Was the Russo-Chinese Bank cognizant of the transaction?

**A** Yes, sir; they were.

**INTERROGATORY No. 55**

**Q** Did they make any objection to this sale?

**A** No objections were raised, presumably for the reason that Ginsburg & Company had a large, open credit with the

Russo-Chinese Bank, much larger than Clarkson & Company had."

MR. GREGORY: I ask that that portion of the answer commencing with the word "presumably" be stricken out as not responsive.

THE COURT: Strike it out.

MR. McCORD: No objections.

"INTERROGATORY No. 56

Q Do you know whether this draft drawn by the Centennial Mill Company and in the hands of the branch of the Russo-Chinese Bank at Port Arthur covering this shipment of flour was ever actually paid?

A No; I have no knowledge, definite knowledge, that it ever was paid since I left Port Arthur long before it fell due."

MR. GREGORY: I object to the remaining part of this answer which is explanatory, because he has already stated he does not know anything about it.

MR. McCORD: Well, he said "if it was not paid"—

MR. GREGORY: He says it was the fault of the bank. How does he know anything about it?

MR. McCORD: The burden is on you, it seems to me, to prove that fact too.

MR. GREGORY: If you want to stand by that, I am willing to take my exception.

MR. McCORD: I am willing you should take it, sir.

MR. GREGORY: Very well.

THE COURT: I will rule out any statement he makes that is not a statement of a fact within his knowledge, any argument or reasons why he thinks something should have happened.

MR. McCORD: I do not think this falls within Your Honor's conclusion, but I will read it and let you see. I don't want to be unfair with the jury. "but if it was not paid by Ginsburg & Company then it was the fault of the Russo-Chinese Bank because the firm of Ginsburg & Company to my definite knowledge have ever since been able to pay this draft and if for any reason the arrangement I made with Ginsburg & Company was avoided or not carried out then the Russo-Chinese



Bank had it within their right and power to demand the surrender of the keys to the warehouse from Ginsburg & Company."

THE COURT: I overrule the objection, or the motion to strike.

MR. GREGORY: Note an exception.

**"INTERROGATORY No. 57**

Q When you say you notified the bank what do you mean?

A I mean that I notified one of the two managers of the Russo-Chinese Bank.

**INTERROGATORY No. 58**

Q Do you know whether or not the Russo-Chinese Bank ever made use of general warehouses for the storage of merchandise covered by bills of lading attached to drafts in their hands for collection?

A Frequently use was made by the Russo-Chinese Bank of general warehouses for goods for which they held the bills of lading attached to drafts drawn on merchants in Port Arthur.

**CROSS-INTERROGATORIES**

**CROSS-INTERROGATORY No. 1**

Q Are you connected with the firm of Clarkson & Company? If so, in what capacity?

A Thank God, I am not.

**CROSS-INTERROGATORY No. 2**

Q Was A. T. Short associate manager with you of the business of Clarkson & Company at Port Arthur?

A Yes sir; as assistant manager or associate manager.

**CROSS-INTERROGATORY No. 3**

Q Was not Short discharged in the latter part of 1903?

A Short disassociated himself from the firm at the end of December, 1903, to the best of my recollection.

**CROSS-INTERROGATORY No. 4**

Q Were you not discharged as manager of the business of Clarkson & Company early in 1904?

A No; positively not. On the 18th of January, 1904, I wrote a letter to Mr. Clarkson in Vladivostok, the head of the firm, in which I refused to comply with certain conditions he had laid down in a letter addressed to me and dated the 12th

of January, 1904, and told him unless he withdrew these conditions I would get out. On the 23rd of January, 1904, he wrote me a letter in reply to mine of the 18th in which he requested me to reconsider my decision. This letter of the 23rd of January, 1904, reached me on the 29th of January, 1904, at a time when I was extremely busy. I had no opportunity of replying in detail but I did write to him on the 1st of February, 1904, acknowledging receipt of his letter of the 23rd of January and telling him that I hoped to be able to answer it very soon. On the 2nd of February, 1904, owing to having received an order for something like fifty thousand tons of coal for the Chinese Eastern Railway Company, I proceeded to Chinwantau on the steamer 'Girin' and arrived at Tientsin on the 4th of February, 1904. I think it is necessary for me here to state that the innovation to which I objected was that I was to have a co-manager and in the future all documents and papers were to be signed by two people on behalf of the firm of Clarkson & Company. . . . Mr. Czechowitz and myself, as I had been the manager of the firm of Clarkson & Company for upwards of four years, during which time I had made for the firm of Clarkson & Company approximately five hundred thousand roubles, practically all of which had been withdrawn for the purpose of financing some of Mr. Clarkson's hair-brain schemes at Vladivostok and I resented any such innovation. I left Chinwantau after having made arrangements with the Chinese Engineering & Mining Company to supply the fifty thousand tons of coal at eleven o'clock P. M. on the 8th of February, 1904. I arrived off of Port Arthur the following morning about ten o'clock. I was on a Russian steamer named 'Ninguta' which was denied admission and denied entrance into the inner harbor. The result of which was I was compelled to remain on board this steamer which was anchored between the Russian and Japanese fleets while the latter bombarded the former for about one hour. Sometime after this the 'Ninguta' was allowed to enter but I was denied permission to go ashore. On my arrival on the shore between four and five o'clock in the afternoon I was informed that Mr. Czechowitz left for Vladivostok by the first train after the bombardment began with the Russian bookkeeper who had taken Mr. Short's place.

The only other office man was a youngster by the name of Newhard and owing to his youth and utter incapacity and the fact that he was then in jail he was unable to render any assistance to me. From what I have since learned it would appear that Clarkson addressed a letter to me on the 30th of January, 1904, which letter he sent to Mr. Czechowicz at Port Arthur and which letter arrived during my absence in Tientsin. This letter notified me that Mr. Clarkson had made Mr. Czechowicz sole manager of the Port Arthur office and asked me to turn over all of the company's business to Mr. Czechowicz and agreed to pay me one month's salary after seven years' work. Mr. Czechowicz, however, it appears was too much concerned with his own safety to remain in Port Arthur to hand this letter over to me and I not knowing of its existence undertook and did my best to protect the interests of the firm of Clarkson & Company during the eight trying days thereafter that I remained in that besieged port. Ultimately being compelled to leave I arrived in Shanghai about the 28th of February, 1904, and on the 29th of the same month, the next day after my arrival, was presented by Mr. A. C. Hunter of Shanghai with the letter from Clarkson dated the 30th of January, 1904. The original of this letter I have now shown the commissioner and ask that it be attached to and made a part of my deposition and marked exhibit A. It is dated 'Jan. 17/30/1904'.

#### CROSS-INTERROGATORY No. 5

Q What was the precise date of your discharge as such manager?

A I would refer you for answer to this cross-interrogatory to my answer given to cross-interrogatory No. 4.

#### CROSS-INTERROGATORY No. 6

Q Was it not prior to February 9/22nd?

A I left Port Arthur on the 17th of February, 1904.

#### CROSS-INTERROGATORY No. 7

Q What was the cause of your discharge as such manager?

A I would refer you for answer to this cross-interrogatory to my answer to cross-interrogatory No. 4.

## CROSS-INTERROGATORY No. 8

Q Did not Mr. Czechowitz succeed you as manager of the business of Clarkson & Company at Port Arthur?

A I would refer you for answer to this cross-interrogatory to my answer to cross-interrogatory No. 4.

## CROSS-INTERROGATORY No. 9

Q After your discharge as manager of the business of Clarkson & Company at Port Arthur what connection with that business did you have?

A After I left Port Arthur on the 17th of February, 1904, I had no connection whatever with the firm of Clarkson & Company or their business.

## CROSS-INTERROGATORY No. 10

Q What do you personally know of the shipment of 35,312 sacks of flour per Steamship Hyades?

A All I know about this shipment is that a steamer belonging to either the Boston Steamship Company or the Boston Towboat Company and called either the 'Hyades' or the 'Pleiades' arrived at Port Arthur on or about the 8th of February, 1904, and while I was manager of the firm of Clarkson & Company at Port Arthur. Just when the steamer referred to arrived I am unable to give the precise date as I was away from Port Arthur on her arrival. On my return to Port Arthur on the afternoon of the 9th of February, 1904, I saw the steamer in the harbor. I arrived after a bombardment by the Japanese fleet and after a considerable delay was able to go on shore, and when I arrived at the office of Clarkson & Company I was told that it was impossible to obtain coolies to continue the discharge of the steamer's cargo. It was too late then on that day to do anything other than to make some effort to protect that part of the cargo which had already been discharged. On the 10th of February, 1904, the captain through the first officer demanded of me as manager of the firm, Clarkson & Company, who were the agents of the steamer, that the steamer be allowed to leave the port, and I thereupon solicited the assistance of one of the managers of the Russo-Chinese Bank to accompany me to the admiral who acted as commander of the port to endeavor to arrange with him to give permission to allow the

steamer to proceed on her voyage. The commander of the port asked me what cargo she had and I told him that it was impossible for me to say what part of her cargo had been discharged and what part to be discharged in as much as some of the lighters had undoubtedly been sunk by the Japanese shells and that a good deal of the cargo had unquestionably been stolen by his own sailors and the Russian soldiers and Chinese. After a good deal of talk he promised me that he would send a sufficient number of sailors on board of the steamer the following day to discharge the rest of the cargo destined for Port Arthur, after which he would give permission for the steamer to leave the port. On the following day a certain number of sailors were sent on board of the steamer and a certain part of the remainder of the cargo was discharged. What part of it is impossible for me to say, and then the steamer was allowed to leave, which she did, for Chefoo.

**CROSS-INTERROGATORY No. 11**

Q Did not the Hyades arrive at Port Arthur January 17/30, 1904?

A To the best of my knowledge the steamer Hyades or Pleiades whichever one it was, arrived at Port Arthur on the 8th day of February, 1904.

**CROSS-INTERROGATORY No. 12**

Q Had you not then been discharged as manager of the business of Clarkson & Company at Port Arthur?

A Positively not, although Mr. Clarkson's letter was written on the 30th of January, 1904, as I have already stated, but it never reached my hands until the 29th of February, 1904.

**CROSS-INTERROGATORY No. 13**

Q Did you ever see a certain draft in writing dated December 11th, drawn by the Centennial Mill Company upon Clarkson & Company, requiring the said Clarkson & Company to pay ninety (90) days after date to the holders of said draft the sum of thirty-six thousand one hundred and ninety-four dollars and 80/100 dollars (\$36,194.80) with interest, exchange and collection fees? If so, state on what date or dates you saw such draft and where it was when you saw it, and specifically



state the last time that you saw said draft and where it then was?

A I have no recollection of ever having seen such a draft.

**CROSS-INTERROGATORY No. 14**

Q Were you in Port Arthur on January 30th, 1904? If so, did you personally on that date accept on behalf of Clarkson & Company the draft referred to in the preceding cross-interrogatory?

A Yes, sir. I have no recollection of ever having done so but it is quite possible that I did.

**CROSS-INTERROGATORY No. 15**

Q Who, if any one did accept said draft?

A I do not now recollect having accepted said draft but it is possible I did so; otherwise I do not know.

**CROSS-INTERROGATORY No. 16**

Q On what date was the first bombardment of Port Arthur by the Japanese?

A On the night of the 8th and 9th of February, 1904.

**CROSS-INTERROGATORY No. 17**

Q Was it not January 27, 1904?

A It was not.

**CROSS-INTERROGATORY No. 18**

Q Were you not, within a few days after January 27, 1904, ordered out of Port Arthur by General Stoessel, the Russian commander of Port Arthur; and did not you and Czeckowitz both leave Port Arthur in pursuance of that order, before February 8/22nd?

A I was ordered to leave Port Arthur on the 9th or 10th of February, 1904. Mr. Czechowitz was never ordered to leave but left late in the afternoon of the 8th or early on the morning of the 9th of February, 1904, whereas I left Port Arthur on the 17th of February, 1904.

**CROSS-INTERROGATORY No. 19**

Q Where did you go then?

A To Shanghai by way of Newchang and Chinwantau.

**CROSS-INTERROGATORY No. 20**

Q When, if at all, did you go back to Port Arthur?

A I have never been in Port Arthur since.



**CROSS-INTERROGATORY No. 21**

Q Who, if you know, represented Clarkson & Company at Port Arthur after you were discharged?

A After I left Port Arthur I believe Mr. Lindquist was sent down from Vladivostok to look after the affairs of Clarkson & Company at Port Arthur.

**CROSS-INTERROGATORY No. 22**

Q Did not Clarkson & Company appoint Newhart manager at Port Arthur February 10/23, 1904, in place of you and Czeckowitz?

A I have no definite knowledge regarding that matter but it would seem impossible that the firm of Clarkson & Company could have appointed a mere youngster like Newhart as manager of their affairs at Port Arthur.

**CROSS-INTERROGATORY No. 23**

Q And did not C. W. Lierogusoff succeed Newhart February 18-March 3rd?

A I never heard of Lierogusoff; never heard of him.

**CROSS-INTERROGATORY No. 24**

Q Are you the W. S. Davidson who, shortly after your discharge as manager of Clarkson & Company at Port Arthur, undertook to sell a lot of flour belonging to or in the possession of Clarkson & Company to Ginsburg & Company?

A I am the W. S. Davidson who, while still manager of the firm of Clarkson & Company at Port Arthur and before I left that port, did sell to Ginsburg & Company a certain quantity of flour.

**CROSS-INTERROGATORY No. 25**

Q And did you not sell that flour at two (2) roubles per sack?

A It is impossible for me to say at this late date the precise price at which the flour was sold for under this arrangement with Ginsburg & Company.

**CROSS-INTERROGATORY No. 26**

A And was not the market price of flour in Port Arthur at that time from 2.5 to 3. roubles per sack?

A There was no market price of flour at that time. The Russians were too busy saving their skins to think of estab-

lishing a definite price for edibles as is usual in cases of besieged ports.

**CROSS-INTERROGATORY No. 27**

Q And was not your attempted sale to Ginsberg & Company at 2.4 roubles per sack?

A As I have already stated I do not remember the precise price at which I made the sale to Ginsburg & Company.

**CROSS-INTERROGATORY No. 28**

Q And were there not two separate bills of sale made by you to Ginsburg & Company for that flour, one at 2. roubles and the other at 2.4 roubles?

A It is quite true that there were two prices arranged by me with Ginsberg & Company. The lower price was sufficient to meet the draft. I saw no reason whatever for allowing the profit on the shipment of flour to be paid into such a pawn-broking establishment as the Russo-Chinese Bank.

**CROSS-INTERROGATORY No. 29**

Q And did not Ginsberg & Company pay you the difference between the two rates, about .4 roubles per sack, part cash and part in a draft on Shanghai? **Explain fully about that matter?**

A I made the sale to Ginsburg & Company at what I considered a fair market value under the circumstances, namely, that I had to leave Port Arthur and that there was no one there I considered eligible to succeed me. The profit was 20 to 25 per cent as near as I can remember. I arranged that a sufficient part of the profits of the sale to meet the draft should be paid into the Russo-Chinese Bank, and as I have already stated, owing to the Russo-Chinese Bank closing its doors on account of the shortage of funds, Ginsburg & Company were unable to pay me in cash but they did give me a draft on their agents in Shanghai. When I made this arrangement I was sold manager of the firm of Clarkson & Company at Port Arthur, a position which I had held since April, 1900, acting under a power of attorney which gave me full and complete powers to carry on the business of the firm of Clarkson & Company. Knowing that Clarkson & Company owed the Russo-Chinese Bank a considerable amount of money, and knowing that the bank would

suffer severe losses as a result of the war between Russia and Japan and knowing also that the firm of Clarkson & Company would be in need of funds to carry them along while the war was in progress, I had no hesitation in accepting and taking Ginsburg & Company's draft on their firm in Shanghai, which it was my intention to pay into Clarkson & Company's branch at Shanghai, but upon my arrival in Shanghai on the 28th of February, 1904, I was presented on the following day by Mr. Hunter with Mr. Clarkson's letter, what was called my discharge, dated the 30th of January, 1904, and I naturally did not pay this draft into the branch firm of Clarkson & Company at Shanghai. I have been a resident of Shanghai ever since and if it is intended by this cross-interrogatory to throw or cast discredit on my standing or my connections, business or otherwise in Shanghai or elsewhere, I want here to say that I have ever since been in a position to refund the sum of fifteen thousand roubles, the amount called for in the draft, providing the firm of Clarkson & Company can establish any good claim to it.

**CROSS-INTERROGATORY No. 30**

Q And did not Clarkson, then at Vladivostok, find out about the transaction between you and Ginsburg & Company and procure the assistance of the Russo-Chinese Bank at Port Arthur in stopping it?

A I do not know what happened at Port Arthur after I left.

**CROSS-INTERROGATORY No. 31**

Q And did not the Russo-Chinese bank at Port Arthur stop your said transaction with Ginsburg & Company; and did not Ginsburg & Company, through the interference of the Russo-Chinese Bank stop payment of the draft they had given you on Shanghai?

A I know nothing whatever about what happened at Port Arthur after I left. It is true, however, the payment of the draft was stopped in Shanghai.

**CROSS-INTERROGATORY No. 32**

Q What was the amount of that draft; was it not about fifteen thousand roubles?

A Yes sir.

**CROSS-INTERROGATORY No. 33**

Q Is it not a fact that after the transaction with you Ginsburg & Company, and in April, 1904, as a compromise with Clarkson & Company, who claimed that you had not authority to make sale of the flour, paid to Clarkson & Company the full price of 2.40 roubles per sack for the same flour; and did not the flour at that price amount to 67,000 roubles?

A I do not know.

**CROSS-INTERROGATORY No. 34**

Q Was any of the flour you attempted to sell to Ginsburg & Company part of the Hyades flour?

A The flour I sold to Ginsburg & Company formed a part of the shipment that arrived in Port Arthur on or about the 8th of February, 1904.

**CROSS-INTERROGATORY No. 35**

Q How many cargoes of flour were received by Clarkson & Company while you were their manager at Port Arthur, against which drafts for collection were held by the Russo-Chinese Bank?

A I should say about a dozen.

**CROSS-INTERROGATORY No. 36**

Q Was the course of dealing in connection with flour different from that in the case of any other importation of merchandise; if it was, state what was the difference?

A I made an arrangement with Mr. Thompson of the Centennial Mill Company in San Francisco in October or November, 1898, by which the Centennial Mill Company were to draw on Clarkson & Company for the value of all flour shipment at ninety days sight without bank credit. The only other merchandise imported by Clarkson & Company regularly was an explosive supplied by a firm in New York, but I believe that no shipments of this material were ever made except under bank credits. These were the only two classes of goods imported regularly. It is true that such things as coal were bought in China from Tientsin, a port only thirty hours teaming away from Port Arthur, on special arrangements, and to this day I believe Clarkson & Company owe the Chinese Engineering & Mining Company, the suppliers of coal, something

like seventy-five thousand Mexican dollars. All other goods that were imported from either America or Europe were only shipped under bank credit.

**CROSS-INTERROGATORY No. 37**

Q If you shall have answered in response to direct interrogatories Nos. 34 to 37, inclusive, that some sort of instrument was customarily executed by the consignee of goods to a bank holding bills of lading and a draft against the goods, that there was such an instrument in the case of the Hyades flour, and that you have no copy of the instrument, please exhibit to the consul an original instrument of the kind you alluded to, procuring it from any source you can, and annexing a copy of it to your deposition as an exhibit with the consul's identification.

A It is impossible for me to procure a similar instrument to the one which was customarily in use in Port Arthur at that time and which the firm of Clarkson & Company executed in favor of the Russo-Chinese Bank at Port Arthur at the time the bank's rendered bills of lading for shipments of merchandise before the draft had been met.

**CROSS-INTERROGATORY No. 38**

Q What would have been the use or purpose of any such an instrument in a case where the flour or the merchandise had already come into the possession of Clarkson & Company as agents of the steamship company?

A In order to differentiate between Clarkson & Company as agents of the steamer and Clarkson & Company consignee of the cargo for which they had not paid and respecting which cargo they still recognized the Russo-Chinese Bank as the owners.

**CROSS-INTERROGATORY No. 39**

Q Your attention is called to a letter addressed by Clarkson & Company of Vladivostok to Clarkson & Company at Port Arthur, of date July 18/31, 1903, a copy of which is hereby annexed, and marked exhibit 1 to cross-interrogatory No. 40, and you will please state whether or not the practice of the 'smaller class of merchants' therein spoken of is the 'custom' to which you have alluded in your answers to interrogatories?

A Positively not.



**CROSS-INTERROGATORY No. 40**

Q How do you know that any such practice was followed in the case of the Hyades flour; when you had not been in the employ of Clarkson & Company or in Port Arthur for several months when the flour was sold?

A As I was in Port Arthur when the flour was sold and as I sold the flour myself I know what I am talking about.

**CROSS-INTERROGATORY No. 41**

Q If you have stated that the Russo-Chinese Bank had knowledge of the Hyades flour outside of the documents in its possession, give the names of the individuals representing it who had such knowledge?

A It is presumable that the Russo-Chinese Bank had in its employ men with some intelligence and consequently that when they received a draft with the documents attached covering a specific shipment that they would make it a point to find out when such a shipment arrived. As to that shipment of flour by the Centennial Mill Company which arrived at Port Arthur on or about the 8th of February, 1904, I know positively that I solicited the assistance of one of the managers of the Russo-Chinese Bank to go with me and interview the admiral in order to get permission to have the steamer leave Port Arthur and was accompanied by him. It must therefore have been known to the Russo-Chinese Bank that the particular shipments had arrived.

**CROSS-INTERROGATORY No. 42**

Q State who were the managers of the Russo-Chinese Bank at Port Arthur from January 1st to May 1st, 1904.

A As I left Port Arthur on the 17th of February, 1904, it is unreasonable to expect that I should know who represented that institution, the Russo-Chinese Bank until the first of May, 1904. From the first of January, 1904, until the time I left, February 17th, 1904, I remember the names of two of the representatives of the Russo-Chinese Bank at Port Arthur, namely Berg and Offsiankin, who were acting as directors or managers of the Russo-Chinese Bank branch at Port Arthur.

**CROSS-INTERROGATORY No. 43**

Q State how you know that the individual you name (if you name any) representing the Russo-Chinese Bank at Port



Arthur had knowledge of the Hyades flour, outside of the documents in its possession; and give all conversation you had with them, or either of them.

A One of the two persons named in my answer to the preceding question accompanied me at the time I had my interview with Admiral Grevy and assisted me in getting permission from the Admiral to have the steamer carrying the flour in question allowed to leave the port, Port Arthur.

**CROSS-INTERROGATORY No. 44**

Q Did you on behalf of Clarkson & Company make any specific agreement with the Russo-Chinese Bank concerning the sale or delivery of the shipment of flour for which the said draft was drawn in payment? If so, state the precise date of such agreement and the name of the officer *of the officer* of the Russo-Chinese Bank with whom you made the same?

A As I have already stated, on or about the 15th of February, 1904, I personally notified either Mr. Berg or Mr. Offsiankin, responsible officers of the Russo-Chinese Bank at Port Arthur, of the arrangement I had made with Ginsburg & Company by which Ginsburg & Company were to take over all of the flour stored in the go-downs of Clarkson & Company and to pay the proceeds of such sale into the Russo-Chinese Bank against a certain draft drawn by the Centennial Mill Company.

**CROSS-INTERROGATORY No. 45**

Q If you shall state in answer to the last cross interrogatory that you did make such specific agreement, state whether the same was oral or in writing, and if in writing, attach the same or copy thereof to this deposition. If the same were oral, state the precise language used by each of the parties thereto?

A The information conveyed to the Russo-Chinese Bank about the sale of the flour to Ginsburg & Company was done orally. Eight years have elapsed since this conversation took place and it is impossible for me to remember the precise language used on that occasion by any of the parties thereto.

**CROSS-INTERROGATORY No. 46**

Q Did the Russo-Chinese Bank, through any of its authorized officers, ever, of your own knowledge, state of Clarkson & Company that Clarkson & Company might take delivery of the

said cargo of flour before the payment of the said draft? If so, state the name of the officer of the Russo-Chinese Bank who gave such consent and the precise times and places at which the same was given.

A In the interview referred in the preceding answer which I had with Mr. Berg or Mr. Offsiankin of the Russo-Chinese Bank they agreed to the arrangement I had made with Ginsburg & Company.

#### CROSS-INTERROGATORY No. 47

Q If, in response to the last cross interrogatory, you shall have stated that such consent was given, state whether or not the same was in writing. If in writing attach the original or copy thereof to this deposition. If oral, state the precise terms thereof and by whom given?

A I have already stated in my answer to cross-interrogatory No. 45, the interview was conducted orally and it is impossible for me to remember the language used on that occasion by any of the parties taking part therein.

#### CROSS-INTERROGATORY No. 48

Q Is it not a fact that after the outbreak of the war Port Arthur was threatened with great danger from the bombardment of the Japanese forces and was not the building of the Russo-Chinese Bank struck by shells of the Japanese forces?

A I only remained in Port Arthur for eight days after the outbreak of hostilities. During these eight days the old quarters of the Russo-Chinese Bank were not struck by any shells of the Japanese forces. On the day I arrived at Port Arthur, the 9th of February, 1904, I landed after the bombardment which had taken place on the morning of that date and I saw the Russo-Chinese Bank moving their belongings from the premises in the old town in which they had done business since the Russian occupation of Port Arthur, to a newly constructed building located in the new town. I believe it was their intention to move their establishment into the new premises about that time. While they may have been influenced as a result of the outbreak of war to do so a little sooner than they otherwise would have done I don't think so.

**CROSS-INTERROGATORY No. 49**

Q Do you know that the Port Arthur branch of the Russo-Chinese Bank found it necessary to transfer a part of their valuables and documents for safekeeping to Harbin?

A I do not know that the Russo-Chinese Bank found it necessary to transfer any of their valuables or documents to Harbin for safekeeping.

**CROSS-INTERROGATORY No. 50**

Q If, in answer to the direct interrogatories, you have stated that Clarkson & Company were allowed to take delivery of cargoes without production of the bill of lading, state if, in each case payment had not first been made to the Russo-Chinese Bank for the goods, and also state whether or not such custom prevailed only as related to bills of lading which the Russo-Chinese Bank has sent to Harbin for safekeeping?

A I have not stated that Clarkson & Company were allowed to take delivery of cargoes without production of the bill of lading.

**CROSS-INTERROGATORY No. 51**

Q Do you know whether or not the draft dated December 11, 1903, heretofore referred to, was sent by the Russo-Chinese Bank from Port Arthur to Harbin?

A I did not.

**CROSS-INTERROGATORY No. 52**

Q If, in answer to the thirty-fourth direct interrogatory, you shall have stated that the Russo-Chinese Bank did consent to the sale of the flour prior to the payment of the draft, then state whether or not you intend by your answer to refer to the particular consignment of flour for which the said draft was given in payment; and if you shall have stated that it did so refer to such particular consignment of flour, then state if you have, in answer to said forty-fourth direct interrogatory, stated all the terms of the agreement by which such consent was manifested?

A My answer to direct interrogatory number thirty-four referred to the consignment of flour which arrived by the steamer that arrived at Port Arthur on the 8th day of February, 1904, and to the best of my recollection, I have stated

all the terms of the agreement by which consent was manifested.

**CROSS-INTERROGATORY No. 53.**

Q If, in answer to the thirty-seventh direct interrogatory, you shall have stated that there was a custom existing between the Russo-Chinese Bank and Clarkson & Company, requiring a written instrument or guarantee to be executed by Clarkson & Company to the Bank, then state whether or not such custom did not refer to and was used only in cases where the bills of lading had been sent by the plaintiff to Harbin for safekeeping?

A It positively referred to all cases where the amount involved was what might be called considerable, such as would be the case in the matter of flour shipments.

**CROSS-INTERROGATORY No. 54**

Q Were not the written instruments our guarantee you have mentioned in substantially the form of the two letters annexed hereto, and marked Exhibits 1 and 2, to Cross-Interrogatory number fifty-four?

A The written instruments referred to by me were in no wise similar to the two letters marked Exhibits 1 and 2 of the cross interrogatory fifty-four which have been shown to me by the Consul-General before whom this deposition is now being taken. These letters refer to shipments made to Port Arthur for various firms by steamers for which Clarkson & Company acted as agents, and to the consignee of such cargo Clarkson & Company would refuse to deliver the goods until Clarkson & Company received letters similar to these from the bank, showing that all dues had been paid on said cargo, and these letters show positively that the Russo-Chinese Bank did look after cargo for which they held the documents and saw to it that the cargo was not delivered to consignees until the cargo was paid for.

**CROSS-INTERROGATORY No. 55**

Q If you shall, in answer to the fifty-seventh direct interrogatory, state that you knew that the draft in question was paid, then state the exact date when the same was paid and by whom, giving the manner of payment, whether by check or by cash. If by check, state on what bank the same was drawn, and, if possible, attach a copy thereof to this deposition?

A I have not made any such statement in answer to direct interrogatory number fifty-seven.

**CROSS-INTERROGATORY No. 56**

Q Have you ever been an officer or employee of the Russo-Chinese Bank?

A No; but in 1897 before I joined the firm of Clarkson & Company I examined some gold mines for Messrs. Epstein and Maslennikoff, two of the managers of the Russo-Chinese Bank at Vladivostok at that time.

**CROSS-INTERROGATORY No. 57**

Q Did you, during the period covered by the Russian-Japanese War, personally have charge of the business of Clarkson & Company at Port Arthur or was that business in charge of another local manager there? If the latter, state the name of such manager?

A I had charge of the business of Clarkson & Company at Port Arthur until the 17th day of February, 1904. I have no positive knowledge as to who was there in Port Arthur managing the business of Clarkson & Company after I left.

**CROSS-INTERROGATORY No. 58**

Q Did you personally attend to all the transactions taking place between the firm of Clarkson & Company and the branch of the Russo-Chinese Bank at Port Arthur?

A I did not.

**CROSS-INTERROGATORY No. 59**

Q Is it not a fact that most of the transactions between the said firm took place while you were absent from Port Arthur and that you had no personal knowledge of the same at the time?

A This is not true as I was not absent from Port Arthur for any long periods during the years I was manager there for Clarkson & Company. During the year 1903 I was not absent for any long period of time; during the year 1902 I was absent for three months; during the year 1901 I was never absent any more than a week at a time and on very few occasions, and during the year 1900 I was only absent on two occasions, once for ten days and once for three months, so that while I may

not have actually gone around to the bank and personally conducted the business, I had full knowledge of all transactions between the bank and Clarkson & Company, the Russo-Chinese Bank and Clarkson & Company.

CROSS-INTERROGATORY No. 60

Q Did you or the firm of Clarkson & Company have any correspondence with the National Bank of Commerce of Seattle with reference to the facts involved in this case and either before or after the first trial thereof. If so, and you have such correspondence in your possession, please attach copies thereof to this deposition. If you have not the original, state as fully and precisely as you can recall the substance of such correspondence?

A I never had any correspondence with the National Bank of Commerce of Seattle with reference to the facts involved in this case. As for Clarkson & Company having had any correspondence with said National Bank of Commerce of Seattle you must ask them for I do not know.

CROSS-INTERROGATORY No. 61

Q Did you ever, prior to the commencement of this suit in April, 1908, inform the National Bank of Commerce of Seattle, or any of its officers, that the draft dated December 11th, 1903, for Thirty-six thousand one hundred and ninety-four and 80/100 Dollars (\$36,194.80) had been paid by Clarkson & Company to the Russo-Chinese Bank? If this information was given by letter, attach to this deposition copies thereof, and if oral, state as precisely as possible the terms of such communication?

A I did not.

MR. GREGORY: May it please the Court, I now ask that all the statements given by the witness, W. S. Davidson concerning the specific arrival of the steamer, and also all his statements concerning the transactions with Ginsberg, be struck out, as it now conclusively appears that his entire testimony is limited to the steamer which arrived at Port Arthur on or about February 8, 1904, and it is admitted in this case that the steamer Hyades left Port Arthur on January 22, 1904.

MR. McCORD: I resist the motion, Your Honor.

THE COURT: I deny the motion.



MR. GREGORY: Note an exception.

THE COURT: Exception allowed.

(EXHIBIT A to Answer to Cross-Interrogatory No. 5)

“Jan. 17th/30th, 1904.

12868

Mr. W. S. Davidson,

Port Arthur.

Dear Sir:—

We herewith notify you that we have made Czechowicz, sole manager of our Port Arthur office, and will ask you to turn over to him, all business of the Company's that you have on hand. While we do not think in any way, that we are bound to give you one day's notice, or keep you a day longer after you receive this letter, we will agree to pay you one month's salary in advance. We will expect you to wind up your business with the office at the earliest possible moment, and will ask you to at once look for new quarters, so that your present living quarters will be at our disposal, at your earliest convenience. We have given Mr. Czechowicz a new Power of Attorney, making him our sole manager, and the P/A which you have recently received from us, we will ask you to turn over to him

Yours very truly,

CLARKSON & CO.

Presented to Mr. Davidson at

Shanghai on 29 Feb., 1904.

pp. Clarkson & Co.

A. C. HUNTER.

W. S. DAVIDSON.

AMOS P. WILDER,

Consul General of U. S. A.”

And thereupon the plaintiff, before the Court had given his charge to the jury, and while the jury were in the jury box in writing requested the Court to charge the jury as follows, to-wit:

I.

That the evidence shows, without contradiction, that such draft had not been paid, and I therefore instruct you to find a verdict in favor of the plaintiff for the above amount, with

interest at the rate of six per cent per annum on \$36,113.70 of said sum from November 9, 1904, and on \$2,298.49 of said sum from December 16, 1904, which charge was by the Court refused and plaintiff duly excepted and its exception was allowed.

## II.

By the decision of the Court of Appeals in this case, 187 Fed. 80, it has been made the law of the case that the complaint states a cause of action, both upon an implied and express contract; that a showing to support the implied contract was made *prima facie* that the money was paid under a mistake of fact.

The payment was made entirely upon the belief of both parties to the transaction that the draft had been paid to the Port Arthur branch. This belief was admittedly erroneous, and therefore plaintiff becomes entitled to its money, as a matter of law, which charge was by the Court refused and plaintiff duly excepted and its exception was allowed.

## III.

I charge you that the Russo-Chinese Bank in this case, in acting as the collecting bank of the draft in question, and as the agency to transmit the documents in question, was bound to use only reasonable and ordinary care and diligence in the exercise of this relationship. In the absence of special instructions, it was not obliged to insure the flour, or see that the same was stored, or to make any inquiries concerning the custody and disposition of the flour. In the absence of special instructions its sole responsibility, as such collecting bank, was to preserve the documents safely, to promptly present the draft for acceptance, and upon non-payment, to protest the same.

The evidence in this case shows that the Russo-Chinese Bank did comply with all of the foregoing obligations imposed upon it by its relation, and that there were no special instructions given it by the National Bank of Commerce of Seattle, except to hold the documents against payment, which the Russo-Chinese Bank did. I therefore instruct you that there is no evidence of negligence against the Russo-Chinese Bank, so far as the disposition of the flour was concerned, which charge was

by the Court refused and plaintiff duly excepted and its exception was allowed.

#### IV.

A collecting bank, in the absence of special instructions, has no responsibility concerning the goods. Its sole obligation is with the documents, which charge was by the Court refused and plaintiff duly excepted and its exception was allowed.

#### V.

In this case, it appears that prior to the draft in question having been sent by the defendant Bank to the plaintiff, the defendant Bank had entered into an arrangement with the Centennial Mill Company, the drawer of the draft, by which the defendant Bank was relieved of all responsibility in connection with said draft. I charge you that by this arrangement, the Russo-Chinese Bank, as the agent of the defendant Bank, was also relieved of responsibility to the full extent of the said agreement. That is, that the Russo-Chinese Bank, as the collecting bank, could not be held to any greater responsibility in the matter than the National Bank of Commerce of Seattle, from whom it received the draft, which charge was by the Court refused and plaintiff duly excepted and its exception was allowed.

I charge you that, in any event, the Russo-Chinese Bank in this matter was only bound to use reasonable and ordinary care and skill. It was not bound to use any extraordinary efforts in connection with the said documents and shipment. Thus, for example, there was no duty imposed upon the Russo-Chinese Bank to investigate as to who were the agents of the steamship line at Port Arthur, or as to whether or not Clarkson & Company were the agents of the steamship line, and there was, therefore, no negligence on the part of the Russo-Chinese Bank in failing to notify the National Bank of Commerce of Seattle that Clarkson & Company were the agents of the steamship line at Port Arthur, which charge was by the Court refused and plaintiff duly excepted and its exception was allowed.

#### VII.

In other words, if you believe that, under the circumstances, the Russo-Chinese Bank used reasonable care and prudence in

failing to mail to the defendant, the draft in question, until the 26th day of May, 1904, then such delay in no wise prejudices the right of the Russo-Chinese Bank to recover in this case. All that its officials at Port Arthur were obliged to do was to use reasonable care and diligence, and if you believe that the conditions there at that time were such that reasonable men might differ as to the proper course to pursue, then the Russo-Chinese Bank is entitled at your hands to a wide discretion in that regard, which charge was by the Court refused and plaintiff duly excepted and its exception was allowed.

### VIII.

In relation to the affirmative claims set up by the defendant, I advise you that they are as follows:

(1) That the draft in question was placed by Clarkson & Company with the plaintiff. In this connection I charge you that there is no evidence on the part of the defendant that this draft was so paid, either in whole or in part, and therefore, this first affirmative defense of the defendant must be disregarded by you.

(2) The second affirmative defense relied upon by the defendant, is that the Russo-Chinese Bank did not present this draft for acceptance upon its arrival, or upon the succeeding day, and did not present the draft for acceptance for several weeks thereafter. In this connection, I charge you that the burden of proof is upon the defendant to prove that the Russo-Chinese Bank did not present such draft for acceptance upon the day of its arrival, or upon the succeeding day, and that the uncontradicted evidence in this case shows that such draft was presented for acceptance on January 23, 1904, being the day after its receipt at Port Arthur by the plaintiff. I therefore instruct you that you must disregard the second affirmative defense set up by the defendant.

(3) The third affirmative defense set up by the defendant in its answer, is that it was, by the custom of bankers, made the duty of the plaintiff to look after, protect and care for the flour represented by the bill of lading upon its arrival at Port Arthur, and that it was the duty of the plaintiff to warehouse the flour and insure the same, and that it was the duty of the plaintiff, by

reason of the instructions given plaintiff by defendant, and by reason of the custom among bankers, not to permit the said flour to be appropriated by Clarkson & Company, or any one else.

In this connection I charge you that there were no instructions given by defendant to plaintiff concerning the care of the flour, and that the only instructions given were to hold the documents against payment; that it was not the duty of the plaintiff to either look after, protect or care for the flour represented by the bill of lading upon its arrival at Port Arthur, or at all, and that it was not the duty of the plaintiff to warehouse the flour, or to insure the same, and that it was not the duty of the plaintiff to prevent the said flour being appropriated by Clarkson & Company, or by any one else, which charge was by the Court refused and plaintiff duly excepted and its exception was allowed.

#### IX.

The evidence shows that the only instructions given to plaintiff by defendant, in regard to the draft and accompanying documents, was to hold them against payment. I instruct you that no custom or usage could impose additional obligations upon plaintiff in this regard than those imposed by this instruction from defendant to plaintiff. Also that defendant did not instruct plaintiff to insure or store the flour and that no custom or usage could impose this obligation upon plaintiff, which charge was by the Court refused and plaintiff duly excepted and its exception was allowed.

#### X.

If you shall believe that the Russo-Chinese Bank was negligent in any respect in regard to its duties in the premises, then I charge you that it is liable, if at all, only for such actual damages as were directly suffered by the Seattle Bank by reason of such negligence. That is, even if you believe that it was the duty of the plaintiff to insure and store this flour and take it out of the control of Clarkson & Company, but that nevertheless if plaintiff had done these things, the flour would have been lost or destroyed by reason of the war conditions at Port Arthur, then I instruct you that such negligence cannot be considered

by you, but that plaintiff is entitled to recover regardless of such negligence, which charge was by the Court refused and plaintiff duly excepted and its exception was allowed.

## XI.

In relation to the payment by Clarkson & Company to the Russo-Chinese Bank of the sum of 67,000 roubles, which had been obtained from Ginsburg & Company, I instruct you that the Bank, in applying such payment, was controlled by the instructions then given it by Clarkson & Company, and that the Bank did not have any right to apply this money, or any part thereof, to any drafts, or any other account, than as specifically directed by Clarkson & Company.

I furthermore instruct you that if there had been no directions given by Clarkson & Company, the Bank would not have had the right to hold the same against a draft which was not then payable.

I furthermore instruct you that the Bank had no right to accept a partial payment for the draft, and deliver the bills of lading upon such partial payment. It was the duty of the Bank to hold these documents until the draft was fully paid. The sum of 67,000 roubles was not sufficient to pay in full the draft in question, and therefore I instruct you that even if all this money had been paid in by Clarkson & Company for the payment of this draft, the Bank would have had no right to deliver the documents until the remainder of the draft had been paid, which charge was by the Court refused and plaintiff duly excepted and its exception was allowed.

## XII.

In considering the duty of the Russo-Chinese Bank to notify the National Bank of Commerce of Seattle of the fact that Clarkson & Company were the agents of the steamship company, I instruct you that if you believe that the Russo-Chinese Bank did not, at that time, know such fact, or if you believe that the Centennial Mill Company, or its representatives, did, at that time, know such fact, then there was no necessity for the plaintiff to give any notice to the defendant concerning the same.



I furthermore instruct you that there was no duty imposed upon the plaintiff whatever, in connection with this transaction, until after it had received the draft in question, which the evidence shows was on January 22, 1904; that unless the Bank had special cause to believe that, at that time, Clarkson & Company were insolvent, or intended in some way to illegally remove the flour from its warehouse, there was no duty whatever imposed upon the plaintiff Bank to send any notice of these things to the defendant.

I furthermore instruct you in this connection, that if you believe that the representative of the Centennial Mill Company was present in Port Arthur during a portion of the time that this flour was in the warehouse of Clarkson & Company, and if the Russo-Chinese Bank knew that this representative was so present on the business of the Centennial Mill Company, then there was no obligation imposed upon the Russo-Chinese Bank to give any notices or make any inquiries concerning the disposition of the flour, because it had a right to believe that all of such matters were being attended to by the representative of the Centennial Mill Company, which charge was by the Court refused and plaintiff duly excepted and its exception was allowed.

### XIII.

I instruct you that the contract between the Boston Towboat Company and the Centennial Mill Company was evidenced by a contract in writing, to-wit: the Bill of Lading, and I instruct you further that such written contract could not be altered or varied by parole or oral arrangements which were not executed, which charge was by the Court refused and plaintiff duly excepted and its exception was allowed.

### XIV.

I instruct you that money paid under a mistake of fact can be recovered by the party so paying, if the mistake is proved, which charge was by the Court refused and plaintiff duly excepted and its exception was allowed.

And thereupon the Court charged the jury as follows:  
**Gentlemen of the Jury:**

In this case the plaintiff seeks to recover from the defendant

the sum of \$38,412.19 with interest, being the return of the same amount of money paid to the defendant, the National Bank of Commerce of Seattle, by the plaintiff, the Russo-Chinese Bank, in two payments made respectively on November 9, 1904, and December 5, 1904.

In this case I instruct you that the uncontradicted evidence shows that these payments were made by the plaintiff to the defendant in reliance upon the representations of the defendant that a draft drawn by the Centennial Mill Company against Clarkson & Company, dated December 11, 1903, had been paid to the Port Arthur branch of the plaintiff.

The plaintiff proceeds upon two theories of the liability of the defendant bank to repay this money. One theory is that there was an express promise, in writing, to repay it if it should be ascertained that the Port Arthur branch of the Russo-Chinese Bank had not collected the money on the draft. The other theory is that there was an implied promise to repay the money if it should be ascertained that the money had not been collected by the Port Arthur branch, because in that case the money was advanced and paid to the defendant upon a mistake of fact. Upon either one of these theories the right to reclaim the money would be dependent upon the question of whether the draft had been collected at Port Arthur by the branch bank, and I will submit to you a question to be answered by the jury, in the nature of a special verdict on this question of the payment of the draft at Port Arthur. You will have to return a general verdict, but this will be a special verdict to determine one particular important fact in the case. You are instructed to return this verdict: "We the jury in the above entitled cause find that the Port Arthur branch of the Russo-Chinese Bank did" or "did not receive payment for the draft dated December 10, 1903, on account of which the plaintiff made the remittance to the defendant alleged in its complaint." I find by the papers that that draft was dated December 11th, not December 10th.

MR. GREGORY: That was my mistake, Your Honor.

THE COURT: Now, when you decide that question, you will find the blank in this verdict in which you will insert the word "did" receive payment, if that is your decision, or the words "did not" receive payment, if you decide the question

in the negative, and have it returned with your verdict in the case, signed by your foreman.

When you have decided that question, if your decision answers this inquiry affirmatively your verdict in the case will be for the defendant, that will necessarily determine the whole case. The converse of that proposition would be that if you find that the draft was not paid, that your verdict should be for the plaintiff, but that is not true, because there are other matters involved which have been litigated in this action and which the jury are required to pass upon before determining the case in favor of the plaintiff bank, which will require your consideration and a determination of other questions upon which the ultimate decision of the case may necessarily turn.

The burden of proof rests upon the plaintiff to prove the facts necessary to constitute either an express promise in writing to pay or an implied promise by reason of a mistake; that is, the plaintiff must prove the facts that are set out in the complaint as the cause of action. Those facts are a promise, in writing, to pay, or a mistake in fact by which the defendant bank obtained money from the plaintiff bank which the plaintiff bank was not obligated in any way to pay and which it did pay under a mistake of fact. Now, all those things have to be proved, and it has to be proved affirmatively by the plaintiff that the draft never was in fact paid at Port Arthur. The plaintiff is required to prove those facts by evidence amounting to a fair preponderance of the evidence when the whole case is considered. Unless there is a preponderance of the evidence in favor of the plaintiff's contentions in regard to those matters, then the plaintiff has failed to prove a cause and your verdict should be for the defendant.

Now, going beyond the question of payment or non-payment of the draft at Port Arthur, the other matters which you have to consider I will endeavor to state to you. This is a commercial transaction in which the Centennial Mill Company made a consignment of flour intended for a merchant at Port Arthur, known as Clarkson & Company. The flour was shipped from Seattle to Port Arthur without being paid for. It was a transaction by which the purchaser was entitled to receive the flour upon paying the contract price for it, and, in order to protect

everybody and make this transaction safe in sending a cargo of flour across the ocean, a resort was had to the usual commercial methods of doing such business. The owner of the flour, the Centennial Mill Company, drew against Clarkson & Company a draft in favor of the National Bank of Commerce of Seattle, and attached to that draft an invoice of the flour, a bill of lading and an insurance policy. The insurance policy and the bill of lading were endorsed in blank and delivered with the draft. The National Bank of Commerce paid to the Centennial Mill Company the amount of the draft, and that vested it with the title, the right to receive the money on that draft and the title to the flour. I should say that the bill of lading called for the delivery of the flour to the order of the consignor, the Centennial Mill Company, and when the bill of lading was endorsed in blank and delivered with the draft to the National Bank of Commerce, that vested in the National Bank of Commerce the title, the ownership of the flour. Delivery of a bill of lading drawn as this one was is the title the same as a deed to a piece of property, a bill of sale, it amounted to a conveyance of the title to the holder of the bill of lading endorsed in blank. Delivery of the bill of lading was a symbolical delivery of possession merely while the flour was in the ship, and the water housemen, after it had been landed and placed in a warehouse at Port Arthur, were bailees for the owner. The owner was the holder of the bill of lading and in law is deemed to be in possession as owner of the property. The National Bank of Commerce endorsed the draft so as to make it payable to the Russo-Chinese Bank at Port Arthur, and transmitted the draft thus endorsed with the other documents attached, to the Russo-Chinese Bank at Port Arthur, and it was received there by that bank. When the Russo-Chinese Bank at Port Arthur received the draft and the accompanying documents endorsed as they all were, and undertook the business of presenting and collecting the draft, it became invested with the title and ownership of the flour as to all of the world except the National Bank of Commerce of Seattle; it had the legal right to sell and dispose of that flour and to receive the proceeds subject to its duty as an agent to account to the National Bank of Commerce for it. In receiving the documents and undertaking the business in

that manner, without special instruction in regard to the care of the flour and the protection of the National Bank of Commerce, it was left free to deal with the flour as an owner might. It was obligated as an agent to act in good faith to protect the rights of the National Bank of Commerce in the collection of the draft. It was authorized to do whatever was necessary in the manner of incurring expense, which would be chargeable against the property, and to be compensated out of the property in its hands, and it was required to deal with the property in the same way that an intelligent and prudent owner of property would deal with his own property, to act for and in place of the National Bank of Commerce in handling the business there at Port Arthur as the National Bank of Commerce would have acted if it had been there, and in a position to act for itself. As the agent for the owner it was obligated to account for the amount of the draft, to account for the security which the bill of lading constituted, and it cannot be excused from obligation to account by saying that the flour disappeared without its knowledge, and require the defendant in this case in order to fasten an obligation upon it, to prove that it was negligent. A principal does not have to prove those things in regard to property or valuables that go into hands of an agent; the agent must render an account in order to be cleared of obligation and liability. That is the rule that is to be applied in this case in determining whether the plaintiff in this case paid out money which it was not obligated to pay to the defendant on account of the draft.

Now, the obligation of the defendant bank to repay the money to the plaintiff bank, depends upon the general question of whether the money was actually paid through a mistake and was paid when there was no liability on the part of the plaintiff bank to pay it. If it was accountable and liable to the defendant bank and paid no more than it was liable for, it has no right of action now to get the money back.

If Clarkson & Company were agents for the steamship, the carrier, and owned the warehouse and received the flour into the warehouse, its bare manual possession would not affect the rights of the owner in dealing with the flour, nor excuse the bank at Port Arthur from the obligation of an agent to see that the flour was not disposed of until paid for, because by the



terms of the contract evidenced by the papers in this case, Clarkson & Company who were the drawees of the draft, were not entitled to have possession of the flour until it was paid for; they could have manual possession as the owner of a warehouse but their possession would not be the possession of an owner, it would be the possession, as I have told you, of a bailee, that is, one who holds possession for the owner entitled to the possession. Now, being a bailee, it was the bailee not only for the owner of the flour, but bailee for the steamship company, the carrier, for the purpose of collecting freight that was earned by the transportation service. The bailee could not sell or dispose of this flour without collecting the freight and without paying the draft, unless the holder of the draft and the bill of lading consented to a sale or disposition of the flour in advance of payment of the draft.

If the bank at Port Arthur while holding the bill of lading gave consent to the sale of the flour by Clarkson & Company that consent would release the carrier from liability for misdelivery or wrong delivery of the flour, and if you find that to be the case, that eliminates that contention out of the case as to the right of either party to proceed against the carrier to collect damages for wrongful delivery.

You, gentlemen, are the exclusive judges of the questions of fact involved in this case. It is for you to determine what the facts are from the consideration of the evidence admitted upon the trial. The party having the affirmative, the burden of proof, must establish the material facts relied upon by at least a fair preponderance of the evidence; otherwise your decision as to any point will be adverse to the party holding the burden of proof for failure of evidence. You will consider the testimony in the case in its entirety and all of it in detail as far as you are able to remember it, and endeavor to arrive at the truth from the testimony as near as you can. In weighing the testimony you will apply the ordinary rules for testing the accuracy and truthfulness and reliability of the testimony of witnesses and documents. A witness whose testimony is not consistent or in accord with other testimony, or where there are discrepancies, is to some extent impeached as a witness, that is, his testimony has to be received with care and scrutiny where it is shown to



be inaccurate in any particular. Discrepancies, however, do not necessarily mean that the testimony may not be true as to the most important and material facts. A man may testify positively that a consignment of flour came on one vessel when in fact he was misinformed about it. He may suppose it was so, he may have been misinformed, his memory may be at fault in regard to that, and if his testimony is inconsistent with facts which are uncontrovertibly true, allowance must be made for it. Where a witness wilfully and intentionally testified falsely to a material fact in a case, his testimony is then so far impeached that the jury have a right to disregard all that he has testified to except insofar as it may be corroborated by other good evidence.

The Court instructs you that anything which obstructs or suspends the ordinary commercial communications between the parties, such as the war between Japan and Russia at Port Arthur during the year 1904, will excuse the sending of notices and other acts which might have with reasonable prudence been imposed upon the Russo-Chinese Bank during the time of business. Necessity excuses all things, and the Russo-Chinese Bank was only required to use ordinary care and diligence. If therefore you believe that by reason of the existence of war mail communications were interrupted between Port Arthur and the outside world, and also telegraphic communication, then the Russo-Chinese Bank was excused thereby to the full extent that it was so prevented from communicating with the outside world by such interference.

That instruction has application to the duties and obligations of a bank receiving a draft presented for acceptance and presented for payment, to give prompt notice of any failure on the part of the drawee to either accept or pay at the time when it is due. There is a claim made that the defendant is not liable in this case because the bank at Port Arthur neglected to present the draft for acceptance. That contention has not been sustained by the evidence. It is contended that the bank at Port Arthur neglected its duty by failure to have the draft protested for non-payment and notice given. It is a question of fact for the jury to decide about that, whether the draft was protested or not, and whether it was returned by mail. There

is evidence for the jury to consider that the draft and notice of protest were deposited in the mail at Port Arthur on the 26th of May, 1904. The counter evidence is that that draft and notice of protest never reached the defendant in this case. There is a legal presumption that when a letter is properly addressed and stamped and deposited in the mail, that it will reach its destination and be delivered to the person to whom it is addressed. That is not a conclusive presumption, but at any rate it is for the jury to determine whether the evidence is sufficient here to enable you to find as a fact that the draft and notice of protest were ever deposited in the mail. There is a contradiction as to the fact whether the draft was protested for nonpayment. That is a question of fact for the jury, that you have to determine the best you can from the evidence in the case. If you find it necessary to decide those questions, in order to determine the liability of the defendant bank to repay the money to the plaintiff bank. If the bank at Port Arthur neglected its obligations or failed to perform its obligations in regard to presentation and demand of payment and protest and giving notice, then it became liable to the defendant for the amount of the draft and for all that it received from the plaintiff bank in the case. If so liable, the plaintiff bank has no right of action now to get the money back that it did pay to meet that liability.

With respect to the return to the defendant of the draft after it was protested for non-payment, I instruct you that if you believe from the evidence that such draft, with bill of protest, was mailed by plaintiff in the public post office of Port Arthur on May 26th, 1904, to defendant, that by such mailing plaintiff performed all the obligations imposed upon it in regard to returning the draft to defendant, and this is true, regardless of whether defendant ever received this mail communication.

The burden of proof rests upon the plaintiff in this action to establish by a fair preponderance of the evidence that the draft in question was not paid by Clarkson & Company to the Russo-Chinese Bank and that at the time the money in controversy was paid by the plaintiff to the defendant the Russo-Chinese Bank was not indebted to the defendant in the amount of said

draft and that the plaintiff had not rendered itself liable to the defendant by permitting Clarkson & Company to appropriate the flour covered by the bill of lading securing the draft, and unless the plaintiff established by a fair preponderance of evidence the fact that such payment was not made by Clarkson & Company prior to the date of the payment of the money in controversy by the plaintiff to the defendant, and that the plaintiff had not rendered itself liable by permitting Clarkson & Company to sell the flour prior to the payment of the draft, then I instruct you that the plaintiff cannot recover in this action and your verdict must be for the defendant.

It is contended by the plaintiff that on the 11th day of December, 1903, the Centennial Mill Company of Seattle drew a draft upon Clarkson & Company at Port Arthur for \$36,194.80 payable to the order of the National Bank of Commerce of Seattle. This draft was secured by a bill of lading issued by a steamship company covering about 36,000 sacks of flour shipped by the Centennial Mill Company to Port Arthur. The Centennial Mill Company was named as consignor in the bill of lading and the flour was to be delivered upon the shipper's order. Insurance policies upon the flour were also issued to the Centennial Mill Company and constituted a part of the collateral for the draft. The draft above mentioned, the bill of lading, and the insurance policies, were indorsed in blank and sent by the National Bank of Commerce of Seattle to the Russo-Chinese Bank at Port Arthur, with instructions to deliver the collateral, or documents, upon the payment of the draft. By virtue of these endorsements and transfers the legal title to the draft and the documents and to the flour in question passed to and became vested in the Russo-Chinese Bank, and I instruct you that as a matter of law it was in the power of the plaintiff to handle, control, sell and dispose of such flour in any way that was deemed expedient by the plaintiff.

It is contended by the defendant in this case that upon the arrival of the draft and the documents attached thereto and the flour at Port Arthur, about the middle of January, 1904, the plaintiff entered into an arrangement or agreement with Clarkson & Company by the terms of which the plaintiff consented to and permitted Clarkson & Company to take possession of the

flour in question and consented that the flour be sold by Clarkson & Company to third parties in open market, and that as a part of such agreement or arrangement between the plaintiff and Clarkson & Company the bank required Clarkson & Company to give to the plaintiff a letter of guaranty, which provided that Clarkson & Company recognized the ownership of the flour by the plaintiff and stipulated that the plaintiff was the owner of the flour in question, and Clarkson & Company upon their part agreed to sell the flour and account to the plaintiff for the proceeds thereof.

If you find from the evidence in this case that plaintiff permitted Clarkson Company to take over the flour under such an arrangement as the defendant claims with the stipulation that the plaintiff was the owner of the flour and with the agreement that Clarkson & Company would account to the plaintiff for the proceeds of the sale of the flour, then I instruct you that such action on the part of the plaintiff constitutes in law a payment of the draft in question and the plaintiff cannot recover and your verdict must be for the defendant.

It is a general rule of law that where collateral security is received for a debt with power to convert the security into money, this is specifically applicable to the payment of such debt; the same person being the party to pay and receive, no act is necessary and the law makes the application. If the proceeds equal or exceed the amount of the debt it is de facto paid; no action would lie for it, and proof of these facts would support the defense of payment. And if you find from the evidence in this case that the plaintiff did consent to Clarkson taking over the flour in question and consented to the sale of the same by Clarkson & Company, and then Clarkson & Company sold the flour in question and paid over the proceeds thereof to the plaintiff, then such payment of the proceeds of the sale of such flour to the plaintiff operated as a payment of the draft in question,—provided the proceeds of the sale of the flour equaled the amount of the draft; and if such proceeds did not equal or exceed the amount of the debt then it was a payment pro tanto—that is a payment of so much of the said draft as the proceeds of the sale of the flour would pay of the same; and this is the law, notwithstanding the fact that plaintiff

may have received the proceeds of the sale of said flour and placed the same to the credit of Clarkson & Company in its bank, and permitted Clarkson & Company to use said funds for other purposes.

It is contended by the defendant that at the time the plaintiff paid to the defendant the \$36,113.70 and the further sum of \$2,298.49, the plaintiff represented to the defendant that the draft in question had been protested for non-payment and that the defendant promised to repay the plaintiff in case the draft had not been paid was in reliance upon such representation by the plaintiff, and that such representation as to the protest of said draft was a material factor in inducing the defendant to consent to the making of such conditional promise to the plaintiff to refund the money paid by the defendant; and if you find from the evidence in this case that the draft in question was not protested within the time provided by law, then I instruct you that the defendant cannot be held to the performance of its agreement to refund the money paid to it by the plaintiff, and your verdict must be for the defendant.

The time fixed by the law for the protest for non-payment of a draft would be at the expiration of the days of grace after the payment was due. This draft was payable thirty days after acceptance or after presentation.

MR. McCORD: Ninety.

THE COURT: Ninety days. It is my mistake. Ninety days and two days of grace were allowed. The last day of grace is the day on which the draft should have been protested.

If you find from the evidence in this case that the plaintiff failed to protest the draft in question for non-payment after its maturity, as required by law, as I have defined the law to you, then I instruct you that such failure on the part of the plaintiff to protest the draft in question would operate to release the Centennial Mill Company, the drawer of the draft, from any liability thereon, and that the defendant would be materially injured by reason of such failure on the part of the plaintiff to have protested the draft at its maturity, by so releasing the drawer of the draft from liability to the de-



fendant, and the plaintiff cannot recover and your verdict must be for the defendant.

It has been suggested and some evidence has been introduced tending to show that the Centennial Mill Company paid to the National Bank of Commerce the amount of the draft in question. I will amend that by saying that there is testimony to the effect, and it is uncontradicted, it is to be taken as a fact in the case, that the Centennial Mill Company has reimbursed the National Bank of Commerce.

I instruct you that even if the Centennial Mill Company did pay the amount of the draft in question to the National Bank of Commerce, either prior or subsequent to the 9th day of November, 1904, when the plaintiff claims to have paid the money in controversy to the National Bank of Commerce, such payment in no way involves the issues in this case, even though the National Bank of Commerce did not notify the Russo-Chinese Bank that the amount of the draft had been paid to it. If the National Bank of Commerce under such circumstances was not acting for itself, it was acting for the Centennial Mill Company, its customer, and as such agent of the Centennial Mill Company had the legal right to demand the payment of the draft in question from the Russo-Chinese Bank, if the Russo-Chinese Bank had received payment for it from Clarkson & Company, or if by its action it had suffered the flour to be sold by Clarkson & Company and the proceeds misappropriated by them, so as to preclude the payment of the draft out of the proceeds of the sale of the flour securing the draft.

That is so, Gentlemen of the Jury, by reason of the law of this state, which authorizes a trustee of an express trust to prosecute and defend actions in its own name. Here the bank, by taking the title to the flour and acting in its business, was authorized to act in its own name clear through to the finish of the transaction, although it may now be acting in the interest of the Centennial Mill Company, which was the vendor of the flour.

In addition to the special verdict, the Court submits two forms of a general verdict. If you find for the plaintiff, you will use the form that is appropriate and insert the amount of



money that is due, including interest at six per cent from the time it was received by the defendant bank until this date. If you find for the defendant the other form of verdict will be sufficient, when it has been signed by your foreman.

I need not exhort the jury to consider the importance of this case and your duty as good citizens and honest jurymen to decide the case according to the law and the rights of the parties, without ever being swayed or influenced at all by any considerations that one is a home corporation and the other is a foreign corporation; such a thing in this court ought not to have a particle of influence whatever. If this money has been obtained from the plaintiff bank when there was no liability for it to pay the money, it is entitled to get it back, according to what I have explained to you. If it is not so entitled, there ought to be no hesitation in rendering a verdict for the defendant.

And thereupon, by stipulation of counsel, after the jury had retired to consider their verdict, and before their verdict was returned, the plaintiff, by its attorney, excepted to certain parts of the charge given to the jury, as follows:

MR. GREGORY: May it please the Court, the plaintiff desires to take certain exceptions to the instructions given, and also to the instructions refused, and also to the instructions requested but modified.

1. We except to the giving of the instruction to the effect that the defendant bank became invested by virtue of the transfer to it of the documents, with the legal title to the flour; and also to the instruction and to each and every part thereof to the effect that by the endorsement and transfer of those documents the plaintiff bank became invested with the legal title to the flour.

2. We except to the instruction given to the effect that the Russo-Chinese Bank was obliged to look after and take care of the flour.

3. We except to the failure of the Court to charge the jury as to the burden of proof concerning the affirmative defenses on the part of the defendant, there having been a charge as the burden of proof so far as the allegations of the complaint

were concerned, but none as to the affirmative defenses of the answer.

4. We except to the instruction to the effect that if the Russo-Chinese Bank failed to give proper notice to Clarkson & Company, it, the Russo-Chinese Bank, became liable for the full amount of the draft, our claim being that if they failed to take this or any other proper step they became liable only for the amount of damage thereby actually suffered and not necessarily for the full amount of the draft.

5. We except to the instruction to the effect that the defendant had no burden to establish the fact that payment of the draft was made by Clarkson & Company to the Russo-Chinese Bank, and the further fact that the Russo-Chinese Bank did permit Clarkson & Company to dispose of the flour without payment of the draft in question.

6. We except to the instruction to the effect that if the plaintiff bank consented that Clarkson & Company should sell the flour in question prior to the payment of the draft, then that the Russo-Chinese Bank by such action rendered itself liable to the National Bank of Commerce and that it became the duty of the Russo-Chinese Bank to pay the money that it did pay to the defendant in 1904 and that the plaintiff cannot recover in this action.

7. We except to the instruction that by virtue of endorsements and transfers of the documents the legal title to the flour passed to and became vested in the Russo-Chinese Bank, and we except further to the instruction that thereby the Russo-Chinese Bank was given the power to handle, control, sell and dispose of the flour in any way that was deemed expedient by the plaintiff.

8. We except to the instruction to the effect that if plaintiff permitted Clarkson & Company to take over the flour under an arrangement between the plaintiff and Clarkson & Company which would recognize by Clarkson & Company the ownership of the flour by the plaintiff and the right of Clarkson & Company to sell the flour, that by such agreement and action on the part of the plaintiff there became in law a payment of the draft in question and that the plaintiff cannot recover, and we except to each and every part of said instruc-

tion, which is numbered 11 of defendant's proposed instructions.

9. We except to the instruction that if the plaintiff consented to Clarkson taking over the flour in question and consented to the sale of the flour by Clarkson & Company and that Clarkson & Company paid over the proceeds of such sale to the plaintiff, then that such payment of the proceeds of the sale of said flour to the plaintiff operated as a payment of the draft in question.

10. We except to the instruction to the effect that where the holder of collateral security for the payment of a note or draft disposes of the collateral, it takes over the title to the same to itself with the intention of making it its own, converting it into its property, and that such action constitutes a payment of the draft or note; and we except to the instruction that if the plaintiff did take over said collateral and did consent that Clarkson & Company should sell the flour, then that such action on the part of the plaintiff operates as a payment of the draft in question; and we specifically object to such instruction upon the ground that it purports to instruct the jury that the entire draft would have been thereby paid, notwithstanding the amount or value of the flour which might have been thus disposed of.

11. We except to the instruction to the effect that if from the evidence it be found that the draft in question was not protested at the time provided by law, then that the verdict must be for the defendant.

12. We except to the instruction to the effect that if the plaintiff failed to protest the draft in question for non-payment after its maturity, then that the verdict must be for the defendant.

13. We except to the instruction to the effect that the payment to defendant by the Centennial Mill Company has no bearing upon the case.

14. We except to the refusal of the Court to give the instruction requested by the plaintiff, except as modified, to the effect that the verdict of the jury should be for the plaintiff for the amount prayed for.

And this was all the evidence and proceedings in the case, not otherwise of record.

And thereupon, in furtherance of justice and that right may be done, the plaintiff presents the foregoing as its Bill of Exceptions and prays that the same may be settled, allowed, signed and certified by the Judge who tried the cause as provided by law.

T. L. STILES,  
CHICKERING & GREGORY,  
DORR & HADLEY,  
Attorneys for Plaintiff.

Received a copy of the within Bill of Exceptions April 13, 1912.

KERR & McCORD,  
S. H. KERR,  
Attorneys for Defendant.

Indorsed: Plaintiff's Bill of Exceptions. Filed in the U. S. District Court, Western Dist. of Washington, April 13, 1912. A. W. Engle, Clerk. By S., Deputy.

*In the District Court of the United States for the Western District of Washington. Northern Division.*

RUSSO-CHINESE BANK, a Corpora- tion,	} Plaintiff,	} No. 1517.
vs.		
NATIONAL BANK OF COMMERCE OF SEATTLE,	} Defendant.	

# ORDER EXTENDING TIME WITHIN WHICH TO FILE BILL OF EXCEPTIONS.

Application having been made by Plaintiff for an extension of time within which to prepare and serve its proposed Bill

of Exceptions in this case, and it appearing that the verdict in this cause was returned on the 29th day of February, A. D. 1912, and it further appearing that the parties have stipulated that plaintiff's time be enlarged and extended for such purpose until the 15th day of April, A. D. 1912;

IT IS THEREFORE ORDERED That Plaintiff may have until the said day in which to file and serve its proposed Bill of Exceptions.

Done in open Court this Sixth day of March, A. D. 1912.

C. H. HANFORD,  
Judge of said Court.

Indorsed: Order for extension of time within which to file Bill of Exceptions. Filed in the U. S. District Court, Western Dist. of Washington, Mar. 6, 1912. A. W. Engle, Clerk. By S., Deputy.

*In the District Court of the United States for the Western  
District of Washington. Northern Division.*

RUSSO-CHINESE BANK, a Corpora-  
tion,

*Plaintiff,*

vs.

NATIONAL BANK OF COMMERCE  
OF SEATTLE,

*Defendant.*

No. 1517.

STIPULATION.

It is hereby stipulated and agreed by and between the above-named plaintiff by its attorneys, Messrs. T. L. Stiles, Warren Gregory and C. W. Door and the above-named defendant by its attorneys, Kerr & McCord and E. S. McCord, that an order may be entered in the above-entitled cause extending the time within which the defendant herein may propose amendments to the Bill of Exceptions heretofore served in the above-entitled cause, for a period of ten days over and

above the time allowed by law and that the said extension shall be up to and including the 2nd day of May, 1912, and that said Bill of Exceptions may be settled and signed at any time thereafter.

Dated this the 18th day of April, A. D. 1912.

T. L. STILES,  
CHICKERING & GREGORY,  
DORR & HADLEY,

Attorneys for Plaintiff.

KERR & McCORD, E. S. McCORD,  
Attorneys for Defendant.

Indorsed: Stipulation. Filed in the U. S. District Court, Western Dist. of Washington, April 23, 1912. A. W. Engle, Clerk. By S., Deputy.

*In the District Court of the United States for the Western  
District of Washington. Northern Division.*

RUSSO-CHINESE BANK, a Corpora- tion,	} Plaintiff,	No. 1517.
vs.		
NATIONAL BANK OF COMMERCE OF SEATTLE,	} Defendant.	ORDER

It appearing to the Court that the parties hereto have entered into a stipulation providing that the defendant may have ten days over and above that allowed by law within which to file its proposed amendments to the Bill of Exceptions herein, it is now by the Court

ORDERED That the above-named defendant be, and it is hereby given up to and including the 2d day of May, 1912, within which to serve its proposed amendments to the Bill of Exceptions herein.

Done in open Court this the 23d day of April, A. D. 1912.

C. H. HANFORD, Judge.



Indorsed: Order. Filed in the U. S. District Court, Western Dist. of Washington, April 23, 1912. A. W. Engle, Clerk. By S., Deputy.

*In the District Court of the United States for the Western District of Washington. Northern Division.*

RUSSO-CHINESE BANK, a Corpora- tion,	} Plaintiff,	No. 1517.
vs.		
NATIONAL BANK OF COMMERCE OF SEATTLE,	} Defendant.	STIPULATION.

It is hereby stipulated and agreed by and between the above-named plaintiff by its attorneys, Messrs. T. L. Stiles, Warren Gregory and C. W. Dorr, and the above-named defendant by its attorneys, Kerr & McCord and E. S. McCord, that an order may be entered in the above-entitled cause extending the time within which the defendant herein may propose amendments to the Bill of Exceptions heretofore served in the above-entitled cause, for a period of twenty days over and above the time allowed by law and that the said extension shall be up to and including the 12th day of May, 1912; and that Bill of Exceptions may be settled and signed at any time thereafter.

Dated this the 18th day of April, A. D. 1912.

T. L. STILES,  
CHICKERING & GREGORY,  
DORR & HADLEY,

Attorneys for Plaintiff.

KERR & McCORD, E. S. McCORD,

Attorneys for Defendant.

Indorsed: Stipulation. Filed in the U. S. District Court, Western Dist. of Washington, May 2, 1912. A. W. Engle, Clerk. By S., Deputy.

*In the District Court of the United States for the Western  
District of Washington. Northern Division.*

RUSSO-CHINESE BANK, a Corpora- tion,	} <i>Plaintiff,</i>	No. 1517.
vs.		
NATIONAL BANK OF COMMERCE OF SEATTLE,	} <i>Defendant.</i>	ORDER

It appearing to the Court that the parties hereto have entered into a stipulation providing that the defendant may have twenty days over and above that allowed by law within which to file its proposed amendments to the Bill of Exceptions herein, it is now by the Court

ORDERED That the above-named defendant be, and it is hereby given up to and including the 12th day of May, 1912, within which to serve its proposed amendments to the Bill of Exceptions herein.

Done in open Court this the 2d day of May, A .D. 1912.

C. H. HANFORD, Judge.

Indorsed: Order. Filed in the U. S. District Court, Western Dist. of Washington, May 2, 1912. A. W. Engle, Clerk. By S., Deputy.

*In the District Court of the United States for the Western  
District of Washington. Northern Division.*

RUSSO-CHINESE BANK, a Corpora- tion,	} <i>Plaintiff,</i>	} No. 1517.
vs.		
NATIONAL BANK OF COMMERCE OF SEATTLE,	} <i>Defendant.</i>	

### ORDER SETTLING BILL OF EXCEPTIONS.

This cause having been brought on regularly before the Court on the 17th day of June, 1912, on the application of the plaintiff for the settling and certifying of its proposed Bill of Exception lately filed herein, as amended by the substitution of the testimony of A. T. Short and W. S. Davidson (deposition) in full in the place of pages 167 to 208, of the original Bill of Exceptions on motion of Defendant's Attorneys.

Now, therefore, on motion of plaintiff's attorneys,

It is ordered that the said proposed Bill of Exceptions heretofore filed in this cause with the amendment as above stated, as the same is now signed, be, and the same is hereby settled as the true Bill of Exceptions in this cause, and that the same, as so settled, be now and here certified accordingly by the undersigned Judge of this court, presiding at the trial of this cause, and that the said Bill of Exceptions so certified be filed by the Clerk.

C. H. HANFORD, Judge.

'Indorsed: Order Settling Bill of Exceptions. Filed in the U. S. District Court, Western Dist. of Washington, June 17, 1912. A. W. Engle, Clerk. By S., Deputy.

*In the District Court of the United States for the Western  
District of Washington. Northern Division.*

RUSSO-CHINESE BANK, a Corpora- tion,	} <i>Plaintiff,</i>	No. 1517. (Circuit)
vs.		
NATIONAL BANK OF COMMERCE OF SEATTLE,	} <i>Defendant.</i>	

### PETITION FOR WRIT OF ERROR.

The above-named plaintiff, Russo-Chinese Bank, a corporation, feeling itself aggrieved, by order of the Court and the judgment entered against it in this cause June 18, 1912, comes now by its attorneys and petitions this Court for an order allowing it to prosecute a Writ of Error in the Honorable United States Circuit Court of Appeals for the Ninth Circuit, under and in accordance with the laws of the United States in that behalf made and provided, and that an order be made fixing the amount of security which plaintiff shall give and furnish upon said Writ of Error, conditioned as required by law as in cases where a supersedeas and stay of execution are desired.

Dated this 5th day of July, 1912.

T. L. STILES,  
CHICKERING & GREGORY,  
DORR & HADLEY,  
Attorneys for Plaintiff.

Endorsed: Petition for Writ of Error. Filed U. S. District Court, Western District of Washington, July 5, 1912.  
A. W. Engle, Clerk. By S., Deputy.

*In the District Court of the United States for the Western  
District of Washington. Northern Division.*

RUSSO-CHINESE BANK, a Corpora- tion,	} Plaintiff,	No. 1517. (Circuit)
vs.		
NATIONAL BANK OF COMMERCE OF SEATTLE,	} Defendant.	

ORDER ALLOWING WRIT OF ERROR AND FIXING  
AMOUNT OF SUPERSEDEAS BOND.

The plaintiff having this day filed its petition for a Writ of Error from the judgment entered herein June 18, 1912, to the United States Circuit Court of Appeals for the Ninth Circuit, together with an Assignment of Errors, all in due time, and praying that an order be made fixing the amount of security which plaintiff shall furnish on said Writ of Error, and that upon the giving of said security all proceedings in this Court be stayed pending the determination of said Writ of Error; it is hereby ordered that a Writ of Error herein is hereby allowed to have said judgment reviewed in the United States Circuit Court of Appeals for the Ninth Circuit; and it is further ordered that upon the plaintiff, Russo-Chinese Bank, filing with the Clerk of this Court a good and sufficient bond in the sum of Five Hundred (\$500.00) Dollars, to the effect that if said plaintiff and plaintiff in error, Russo-Chinese Bank, shall prosecute the said Writ of Error to effect, and answer all damages and costs if it fails to make its plea good, then the said obligation to be void; otherwise to remain in full force and virtue. Said bond to be approved by the Court, and all further proceedings in this Court be, and are hereby suspended and stayed until the determination of the said Writ of Error by the Honorable United States Circuit Court of Appeals for the Ninth Judicial Circuit.

Dated at Seattle, the 5th day of July, 1912.

C. H. HANFORD, Judge.

Endorsed: Order Allowing Writ of Error and Fixing Bond. Filed U. S. District Court, Western District of Washington. July 5, 1912.

A. W. ENGLE, Clerk.  
By S., Deputy.

*In the District Court of the United States for the Western  
District of Washington. Northern Division.*

RUSSO-CHINESE BANK, a Corpora- tion,	} <div style="margin-left: 10px;">           Plaintiff in Error,            vs.            No. 1517.            (Circuit)         </div>
NATIONAL BANK OF COMMERCE OF SEATTLE,	
<i>Defendant in Error.</i>	

### BOND.

Know All Men by These Presents: That we, the Russo-Chinese Bank, a corporation, as principal, and American Bonding Company of Baltimore, as sureties, are held and firmly bound unto the National Bank of Commerce of Seattle, defendant above-named, in the sum of Five Hundred (\$500) Dollars, to be paid to the said National Bank of Commerce of Seattle, its successors and assigns, to which payment well and truly to be made we bind ourselves, and each of us, jointly and severally, and our, and each of our successors, representatives and assigns, firmly by these presents.

Sealed with our seals and dated the 5th day of July, A. D. 1912.

Whereas, plaintiff above-named has sued out a Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment entered by the above-named Court in favor of defendant and against plaintiff in the sum of One Hundred and 30-100 Dollars, June 18, 1912.

Now therefore, the condition of this obligation is such that the above-named plaintiff shall prosecute said Writ of



Errors to effect, and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise shall be and remain in full force, virtue and effect.

Witness our seals and names hereto affixed the 5th day of  
July, 1912.

(Seal) **RUSSO-CHINESE BANK,**  
By **T. L. STILES**, Its Attorney.  
**AMERICAN BONDING COMPANY OF**  
**BALTIMORE,**  
By **L. N. HANSEN**, Attorney in Fact.

Approved July 5, 1912.

C. H. HANFORD, Judge.

Endorsed: Bond. Filed U. S. District Court, Western District of Washington, July 5, 1912.

A. W. ENGLE, Clerk.  
By S., Deputy.

*In the District Court of the United States for the Western  
District of Washington. Northern Division.*

RUSSO-CHINESE BANK, a Corpora-	}	No. 1517.
<i>Plaintiff.</i>		
vs.		
NATIONAL BANK OF COMMERCE		
OF SEATTLE,	}	(Circuit)
<i>Defendant.</i>		

Comes now the plaintiff, Russo-Chinese Bank, and files the following Assignment of Errors upon which it will rely in the prosecution of its Writ of Error in the above-entitled cause.

## L.

That the trial court erred in overruling the objection of counsel for plaintiff in error to the questions asked the witness R. R. Spencer upon cross-examination by counsel for defendant in error as to the customs and commercial usage among

bankers with regard to the return of the documents when drafts are protested, and which said questions, answers and objections are as follows:

1. "Q Now, Mr. Spencer, counsel has directed your attention to the letter of January 9/22, 1904, addressed by the Russo-Chinese Bank to the National Bank of Commerce, in which there are certain printed sections beneath the letter or in the letter, in which it is stated that 'Unless otherwise instructed, bills of any description sent to us for procuring acceptance or for collection will be protested both for non-acceptance or non-payment and immediately returned to the sender.' Regardless of that provision which I have just read to you, I will ask you what the custom is among bankers, and what is the commercial usage among bankers, with regard to the return of the documents when drafts are protested, or otherwise?"

(Trans. p. —.)

To which question counsel for plaintiff in error objected upon the ground that there was no occasion for the introduction of any usage or custom; that the transaction in the case was a definite contract, formed by letters which said that the documents should be delivered as against the payment; that there was no doubt or ambiguity concerning the matter, and, therefore, the custom or usage was not admissible.

This objection was overruled and an exception allowed plaintiff.

Thereupon the witness answered (Trans. p —):

"A. They are supposed to protest the draft for non-acceptance and non-payment and it is customary where large amounts are involved, to cable the fact that the draft has been protested for non-acceptance or non-payment. No cablegram was sent to us regarding that matter from Port Arthur."

2. Thereupon counsel for defendant asked said witness the following question: (Trans. p. —)

"Q I want to call your attention to the second sub-division of the printed matter contained on the letter to which I have just referred, which reads as follows: 'When sending us for collection documentary bills or only documents, clearly state

in your letter accompanying same whether in case of dishonor:—(a) both bill and documents are to be promptly returned with the relative deed a protest, or (b) if the bill is to be returned and the relative documents are to be kept here at your disposal, or (c) if the goods are to be stored by us and fire insurance is to be covered pending receipt of your instructions.'

I will ask you, Mr. Spencer, to state what the commercial usage among bankers is, between the forwarding bank and the collecting bank, as to the duty or custom of the collecting bank to return the documents upon the dishonor of the draft, either for non-payment or for non-acceptance, and the documents accompanying them.

To which question counsel for plaintiff also objected upon the ground that it was not a proper subject for custom, and that the contract specifically and directly provided what was to be done.

The Court thereupon stated:

"I take it that you mean by 'custom' the course of business."

COUNSEL FOR DEFENDANT: "That is all."

THE COURT: "And I think it is proper to explain to the jury the course of business as bankers understand it."

COUNSEL FOR DEFENDANT: "That is exactly what I am trying to do."

The Court thereupon overruled the objection and an exception was allowed plaintiff.

Thereupon the witness answered:

"A They will hold all documents until they receive an answer. It is ordinarily customary for them to hold the draft and documents until they can receive advice, especially the bills of lading, in order that they may be able to take action in regard to the goods. I am speaking now in any event that they cable us we would give them specific instructions as to what to do. The reason those instructions are not included in our letter is from the fact that we never know what contingency may arise, consequently we leave it to their judgment to take such steps in the event of any contingency as they would take to protect their own property, by advising us."

Whereupon counsel for plaintiff said:

"We ask that that portion of the answer commencing with

'the reason' to the end go out as not responsive to the question and as incompetent, irrelevant and immaterial."

This motion to strike out was denied by the trial court and an exception allowed to plaintiff.

3. Thereupon counsel for defendant asked the said witness the following question: (Trans. p. —.)

"Q In the absence of instructions, what is the commercial usage in regard to the return of the documents? Suppose there is no telegraphic communication, they don't advise of the fact of the dishonor, the forwarding bank knows nothing about it, what is the duty of the bank upon the dishonor of the paper, and what is the custom in regard to the return of the draft and the documents?"

To which question counsel for plaintiff made the same objection as hereinbefore stated, which objection was overruled by the trial court and an exception allowed the plaintiff.

Thereupon the witness answered:

"A The custom would be to return the draft—protest and return the draft, either for non-acceptance or non-payment, as the case might be."

4. Thereupon counsel for defendant asked the said witness the following question: (Trans. p. —.)

"Q What would become of the documents?"

A The documents would be held and probably used in the matter of storing the goods. They would be compelled—should they store the goods and take such steps as might be necessary to protect our interest, the documents might have to be delivered to the steamship company or used in the storage of the goods. The draft would be protested and returned and should be protested and returned promptly."

5. Thereupon counsel for defendant asked the said witness the following question: (Trans. p. —.)

"Q What is the custom, in case of the dishonor of a draft or non-payment, of the collecting bank, in the absence of instructions, in regard to storing and protecting the goods?"

Whereupon counsel for plaintiff objected to the said question as incompetent, irrelevant and immaterial and calling for a conclusion of law, saying that the courts have very clearly defined what the powers and duties of collecting banks are.

This objection was overruled by the trial court and an exception allowed plaintiff.

Thereupon the witness answered:

"A They are expected to use diligence in taking such steps in regard to storage, insurance and so forth as they would take were the property their own and under their own immediate—and in their own immediate possession."

Whereupon counsel for plaintiff asked that the answer be stricken out as not responsive and as not stating what the custom is, and as not stating over what extent of territory the alleged custom went, or whether it would apply in this particular instance.

This motion to strike out was denied by the trial court and an exception allowed plaintiff.

6. Thereupon counsel for defendant asked said witness the following question: (Trans. p. —.)

"Q As I take it, then, Mr. Spencer, these requirements or these suggestions that the Russo-Chinese Bank made to you as to what you should tell them when you sent the draft, what to do with it in case of dishonor, as I understand you the commercial usage would control that regardless of whether you told them to do so or not?"

To which question counsel for plaintiff objected as calling for a conclusion of law, the witness substituting his opinion for what the law says.

This objection was overruled and an exception allowed plaintiff.

The witness thereupon answered "Yes."

## II.

That the trial court erred in overruling an objection to a question asked by the trial court of the witness R. R. Spencer upon redirect cross-examination as follows:

"Q In the case of flour, Mr. Spencer, sent to a foreign country, with a draft, 30-day draft or a time draft payable at sight, attached to a bill of lading, what is the course of business as between banks with regard to the custody of the flour during the time intervening from the presentation and accept-

ance of the draft, if it should be accepted, and the date when the payment on the draft would be due?"

Whereupon counsel for plaintiff objected to the question. The objection was overruled and an exception allowed plaintiff. The plaintiff thereupon answered:

"The goods are supposed, or are, or at least should be stored in an independent warehouse, that is, a warehouse that is free from the interference of the consignee of the goods. Ordinarily the policies of the insurance follow the draft, so that the bank has knowledge that the goods are insured. If the goods are deliverable upon acceptance and the party accepts the draft, of course he takes the bills of lading and the sending bank of the drawer assumes all liability from then on. If the drafts are payable—if the draft is drawn 'Delivery of documents on payment only' then it is the duty of the bank, so far as it can exercise it by reasonable diligence, to hold possession indirectly, by warehousemen, of those goods, until it delivers the bill of lading or the warehouse receipts which are substituted for the the bill of lading."

### III.

That the trial court erred in overruling the objections to the questions asked by counsel for defendant of the witness R. R. Spencer, when recalled for re-cross-examination, to the effect that if the goods were house in an independent warehouse the witness would not consider it the custom of bankers to look after that shipment; and further that if there were anything to excite the suspicion of the collecting bank, what would be the custom of the bank; to all of which questions counsel for plaintiff objected as not proper cross-examination and assuming a state of facts which were not proven to have existed, to-wit, that there was any reason for suspicion on the part of the bank at Port Arthur, to which rulings exception were allowed plaintiff.

### IV.

That the trial court erred in overruling the objection of plaintiff to a question asked by defendant of the witness, William S. Davidson, as follows:



"Q What is the custom of banks with reference to presenting drafts for acceptance?"

To which counsel for plaintiff objected as follows:

"Now, may it please the Court, we desire to object to that question as incompetent, irrelevant and immaterial, upon two grounds: First, that there is no reason for the Court to now invoke any custom or usage, because the contract in this case is clear and specific and direct; in other words, there is no necessity for an implied contract, because there is an express one; and, upon the second ground, that the question does not refer to the conditions prevailing in this case, because it does not ask with reference to presenting drafts for acceptance there, sent as against payment, but it asks generally as to drafts for acceptance. Now, of course there may be one custom of bankers concerning one sort of a draft and another concerning the other kind of a draft, but to invoke now a custom generally and say that it applies to this case is, we submit, utterly incompetent, irrelevant and immaterial."

The objection was overruled and exception noted; thereupon the witness answered as follows:

"As soon as the bank receives the draft it is customary for them to request the drawee to accept it, either by asking the drawee to come to the bank, or sending it around to his office."

## V.

That the trial court erred in overruling the objection to the question asked the witness Davidson by defendant, as follows:

"What is the established custom among bankers at Oriental ports with reference to the handling of drafts with bill of lading and documents attached, when the drafts are in their hands for collection?"

'This objection was upon the ground that there was no pleading concerning the matter and that the question did not state whether the draft referred to authorized the bank to turn the bill of lading over when the draft was accepted, or whether it instructed the bank to retain the bill of lading until it was paid.

Which objections were overruled and exception allowed plaintiff.

In connection with this question the following took place:  
Counsel for plaintiff:

"I do not want to seem unduly insistent, Your Honor, and therefore I shall not further take up the time of the Court and jury with this matter, because we have our exception, but I simply wish to again assert that I do not think counsel can find any authority which says that where there is a precise contract expressed, as there was here, that custom or usage can ever be invoked when that contract is not ambiguous. That is my understanding of the law.

THE COURT: I will give an instruction like that to the jury in this case."

COUNSEL FOR PLAINTIFF: "Then, if Your Honor please, if that is so, and the contract in this case is not ambiguous but is precise, the testimony is not admissible.

THE COURT: It may go in as a part of the *res gestae*—of the circumstances of the transaction."

COUNSEL FOR PLAINTIFF: "Note an exception.

THE COURT: Exception allowed."

Thereupon the witness answered as follows:

"The custom of the Russo-Chinese Bank at Port Arthur was to see that the cargo was stored and insured, and the managers of the Russo-Chinese Bank have frequently come into the office of Clarkson & Co. to ascertain if certain cargo was properly stored and have taken out fire insurance with some of the fire insurance companies for which Clarkson & Co. acted as agents on such cargo."

COUNSEL FOR PLAINTIFF: "We ask now, first, that the answer go out, as incompetent, irrelevant and immaterial—the entire answer, and then we specifically ask that that portion of the answer which begins with the words 'and the managers of the Russo-Chinese Bank have frequently come to the office of Clarkson & Company' down to the end of the sentence, be stricken out as not responsive to the question and as being no evidence of a custom."

COUNSEL FOR DEFENDANT: "It is clearly responsive to the question.

THE COURT: Motion to strike is denied."

COUNSEL FOR PLAINTIFF: "We note an exception."

## VI.

The trial court erred in overruling the objection of plaintiff to the question asked the witness Davidson, as follows:

"In transactions taking place between the firm of Clarkson & Company at Port Arthur and the branch of the Russo-Chinese Bank at Port Arthur, were these customs strictly observed."

The objection to this question was upon the ground that such custom of not observing a custom was not pleaded and that the practice referred to in the question must be diametrically opposite to the custom pleaded in the answer, and that it is impossible that a custom existed if the practice was contrary to it. This objection was overruled and exception allowed plaintiff. The witness thereupon answered that the custom was not strictly observed, as the Russo-Chinese Bank at Port Arthur allowed Clarkson & Company to have the bills of lading and other documents attached to the draft before the draft was paid.

The trial court also erred in denying the motion of plaintiff to strike out from the last answer of the witness that portion which followed the word "allowed," upon the ground that that portion of the sentence was not responsive to the question and that it was not pleaded, to which ruling on said motion an exception was taken.

## VII.

That the trial court erred in overruling the objection to the question asked the witness Davidson:

"Why would the bank permit this to be done by Clarkson & Company."

The objection to this question being upon the ground that it was incompetent and a cross-examination of defendant's own witness. The objection being overruled, and exception noted, the witness answered that it was because the firm of Clarkson & Co. was established at the instigation of the Russo-Chinese Bank.

## VIII.

That the trial court erred in denying the motion of plaintiff to strike out from the last aforesaid answer of the witness Davidson all that portion which followed the words "Mr. Clarkson went to Vladivostock," as not being responsive to the question, which motion to strike out was denied and an exception allowed plaintiff.

## IX.

That the trial court erred in overruling the objection of plaintiff to the questions asked the witness Davidson by defendant concerning the custom and practice and course of dealing between the Russo-Chinese Bank and Clarkson & Co. at Port Arthur and to the answers thereto, to which rulings exceptions were allowed plaintiff.

## X.

That the trial court erred in denying the motion of plaintiff to strike out from the answer of the witness Davidson to Direct Interrogatory 33 the following portion:

"On or about the 15th of February, 1904, the Russo-Chinese Bank did consent to the sale of the flour ex steamship "Hyades," if that is the name of the steamer that arrived at Port Arthur on or about the 8th day of February, 1904."

This motion to strike out being upon the ground that the same was not responsive to the question and that it now appeared in the case by stipulation that the Hyades arrived at Port Arthur on January 17th.

## XI.

That the trial court erred in denying the motion of plaintiff to strike out from the answer of the witness Davidson to Direct Interrogatory 56 that portion thereof to the effect that if the draft was not paid by Ginsburg & Company, then it was the fault of the Russo-Chinese Bank. This motion was made upon the ground that the witness had already stated that he did not know whether the draft was paid or not, and to which ruling an exception was allowed plaintiff.

## XII.

The trial court erred in overruling the objection to the question asked the witness A. T. Short, as follows:

"Now, in all your dealings with the Russo-Chinese Bank in handling the other shipments of the Centennial Mill Company I will ask you what arrangements if any was made with the bank in regard to the handling of this flour?"

This question was objected to upon the ground that it was not binding in the special case, and to the order overruling such objection an exception was allowed plaintiff. The witness thereupon stated the rule that Clarkson always gave the bank a letter of guaranty.

## XIII.

The trial court erred in denying the motion of plaintiff to strike out the answer of the witness Short to the following question asked by defendant:

"Did they know that Clarkson & Co. were in possession of the 'Hyades' flour or thirty-six thousand sacks?"

To which the witness answered:

"They could not help but know it."

## XIV.

The trial court erred in denying the motion of plaintiff to strike out from the answer of the witness Short in response to the question "Who told them," the following:

"I would tell them or Davidson would tell them. The object of getting a ninety days sight draft was that we could get delivery without payment, but that we paid the money as soon as we got it. As soon as the flour was sold the money was collected in."

Said motion to strike out being directed to all that portion of the answer beginning with the words "The object," and which said motion was denied and exception allowed plaintiff.

## XV.

The trial court erred in giving the following instructions to the jury, to each and every of which an exception was taken by plaintiff:

1. "I should say that the bill of lading called for the delivery of the flour to the order of the consignor, the Centennial Mill Company, and when the bill of lading was endorsed in blank and delivered with the draft to the National Bank of Commerce, that vested in the National Bank of Commerce the title, the ownership of the flour. Delivery of a bill of lading drawn as this one was is the title the same as a deed to a piece of property, a bill of sale, it amounted to a conveyance of the title to the holder of the bill of lading endorsed in blank. Delivery of the bill of lading was a symbolical delivery of possession merely while the flour was in the ship, and the warehousemen, after it had been landed and placed in a warehouse at Port Arthur, were bailees for the owner. The owner was the holder of the bill of lading and in law is deemed to be in possession as owner of the property. The National Bank of Commerce endorsed the draft so as to make it payable to the Russo-Chinese Bank at Port Arthur, and transmitted the draft thus endorsed with the other documents attached, to the Russo-Chinese Bank at Port Arthur, and it was received there by that bank. When the Russo-Chinese Bank at Port Arthur received the draft and the accompanying documents endorsed as they all were, and undertook the business of presenting and collecting the draft, it became invested with the title and ownership of the flour as to all of the world except the National Bank of Commerce of Seattle; it had the legal right to sell and dispose of that flour and to receive the proceeds subject to its duty as an agent to account to the National Bank of Commerce for it. In receiving the documents and undertaking the business in that manner, without special instruction in regard to the care of the flour and the protection of the National Bank of Commerce, it was left free to deal with the flour as an owner might."

2. "It was authorized to do whatever was necessary in the manner of incurring expense, which would be chargeable against the property, and to be compensated out of the property in its hands, and it was required to deal with the property in the same way that an intelligent and prudent owner of property would deal with his own property, to act for and in place of the National Bank of Commerce in handling the business there at Port Arthur as the National Bank of Commerce would have



acted if it had been there, and in a position to act for itself. As the agent for the owner it was obligated to account for the amount of the draft, to account for the security which the bill of lading constituted, and it cannot be excused from obligation to account by saying that the flour disappeared without its knowledge, and require the defendant in this case in order to fasten an obligation upon it, to prove that it was negligent. A principal does not have to prove those things in regard to property or valuables that go into the hands of an agent; the agent must render an account in order to be cleared of obligation and liability. That is the rule that is to be applied in this case in determining whether the plaintiff in this case paid out money which it was not obligated to pay to the defendant on account of the draft."

3. "If the bank at Port Arthur neglected its obligations or failed to perform its obligations in regard to presentation and demand of payment and protest and giving notice, then it became liable to the defendant for the amount of the draft and for all that it received from the plaintiff bank in the case. If so liable, the plaintiff bank has no right of action now to get the money back that it did pay to meet that liability."

The objection to this instruction being that it stated the plaintiff became liable for the full amount of the draft, and not only for the amount of the damage actually suffered.

4. "The burden of proof rests upon the plaintiff in this action to establish by a fair preponderance of the evidence . . . that the plaintiff had not rendered itself liable to the defendant by permitting Clarkson & Company to appropriate the flour covered by the bill of lading securing the draft, and unless the plaintiff established by a fair preponderance of evidence the fact that such payment was not made by Clarkson & Company prior to the date of the payment of the money in controversy by the plaintiff to the defendant, and that the plaintiff had not rendered itself liable by permitting Clarkson & Company to sell the flour prior to the payment of the draft, then I instruct you that the plaintiff cannot recover in this action and your verdict must be for the defendant."

5. "The draft above mentioned, the bill of lading, and the insurance policies, were indorsed in blank and sent by the Na-

tional Bank of Commerce of Seattle to the Russo-Chinese Bank at Port Arthur, with instructions to deliver the collateral, or documents, upon the payment of the draft. By virtue of these endorsements and transfers the legal title to the draft and the documents and to the flour in question passed to and became vested in the Russo-Chinese Bank, and I instruct you that as a matter of law it was in the power of the plaintiff to handle, control, sell and dispose of such flour in any way that was deemed expedient by the plaintiff."

6. "If you find from the evidence in this case that plaintiff permitted Clarkson & Company to take over the flour under such an arrangement as the defendant claims with the stipulation that the plaintiff was the owner of the flour and with the agreement that Clarkson & Company would account to the plaintiff for the proceeds of the sale of the flour, then I instruct you that such action on the part of the plaintiff constitutes in law a payment of the draft in question and the plaintiff cannot recover and your verdict must be for the defendant."

7. "If you find from the evidence in this case that the plaintiff failed to protest the draft in question for non-payment after its maturity, as required by law, as I have defined the law to you, then I instruct you that such failure on the part of the plaintiff to protest the draft in question would operate to release the Centennial Mill Company, the drawer of the draft, from any liability thereon, and that the defendant would be materially injured by reason of such failure on the part of the plaintiff to have protested the draft at its maturity, by so releasing the drawer of the draft from liability to the defendant, and the plaintiff cannot recover and your verdict must be for the defendant."

## XVI.

That the trial court erred in refusing to give the following instructions requested by the plaintiff, and to each of such refusals an exception was noted by plaintiff:

1. "That the evidence shows, without contradiction, that such draft had not been paid, and I therefore instruct you to find a verdict in favor of the plaintiff for the above amount, with interest at the rate of six per cent per annum on \$36,113.70

of said sum from November 9, 1904, and on \$2,298.49 of said sum from December 16, 1904.

2. "By the decision of the Court of Appeals in this case, 187 Fed. 80, it has been made the law of the case that the complaint states a cause of action, both upon an implied and express contract; that a showing to support the implied contract was made *prima facie* that the money was paid under a mistake of fact.

The payment was made entirely upon the belief of both parties to the transaction that the draft had been paid to the Port Arthur branch. This belief was admittedly erroneous, and therefore plaintiff becomes entitled to its money, as a matter of law."

3. "I charge you that the Russo-Chinese Bank in this case, in acting as the collecting bank of the draft in question, and as the agency to transmit the documents in question, was bound to use only reasonable and ordinary care and diligence in the exercise of this relationship. In the absence of special instructions, it was not obliged to insure the flour, or see that the same was stored, or to make any inquiries concerning the custody and disposition of the flour. In the absence of special instructions its sole responsibility, as such collecting bank, was to preserve the documents safely, to promptly present the draft for acceptance, and upon non-payment, to protest the same.

The evidence in this case shows that the Russo-Chinese Bank did comply with all of the foregoing obligations imposed upon it by its relation, and that there were no special instructions given it by the National Bank of Commerce of Seattle, except to hold the documents against payment, which the Russo-Chinese Bank did. I therefore instruct you that there is no evidence of negligence against the Russo-Chinese Bank, so far as the disposition of the flour was concerned."

4. "A collecting bank, in the absence of special instructions, has no responsibility concerning the goods. Its sole obligation is with the documents."

5. "In this case, it appears that prior to the draft in question having been sent by the defendant Bank to the plaintiff, the defendant Bank had entered into an arrangement with

the Centennial Mill Company, the drawer of the draft, by which the defendant Bank was relieved of all responsibility in connection with said draft. I charge you that by this arrangement, the Russo-Chinese Bank, as the agent of the defendant Bank, was also relieved of responsibility to the full extent of the said agreement. That is, that the Russo-Chinese Bank, as the collecting bank, could not be held to any greater responsibility in the matter than the National Bank of Commerce of Seattle, from whom it received the draft."

6. "I charge you that, in any event, the Russi-Chinese Bank in this matter was only bound to use reasonable and ordinary care and skill. It was not bound to use any extraordinary efforts in connection with the said documents and shipment. Thus, for example, there was no duty imposed upon the Russo-Chinese Bank to investigate as to who were the agents of the steamship line at Port Arthur, or as to whether or not Clarkson & Company were the agents of the steamship line, and there was, therefore, no negligence on the part of the Russo-Chinese Bank in failing to notify the National Bank of Commerce of Seattle that Clarkson & Company were the agents of the steamship line at Port Arthur."

7. "In other words, if you believe that, under the circumstances, the Russo-Chinese Bank used reasonable care and prudence in failing to mail to the defendant, the draft in question, until the 26th day of May, 1904, then such delay in no wise prejudices the right of the Russo-Chinese Bank to recover in this case. All that its officials at Port Arthur were obliged to do was to use reasonable care and diligence, and if you believe that the conditions there at that time were such that reasonable men might differ as to the proper course to pursue, then the Russo-Chinese Bank is entitled at your hands to a wide discretion in that regard."

8. "In relation to the affirmative claims set up by the defendant, I advise you that they are as follows:

(1) That the draft in question was placed by Clarkson & Company with the plaintiff. In this connection I charge you that there is no evidence on the part of the defendant that this draft was so paid, either in whole or in part, and there-

fore, this first affirmative defense of the defendant must be disregarded by you.

(2) The second affirmative defense relied upon by the defendant, is that the Russo-Chinese Bank did not present this draft for acceptance upon its arrival, or upon the succeeding day, and did not present the draft for acceptance for several weeks thereafter. In this connection, I charge you that the burden of proof is upon the defendant to prove that the Russo-Chinese Bank did not present such draft for acceptance upon the day of its arrival, or upon the succeeding day, and that the uncontradicted evidence in this case shows that such draft was presented for acceptance on January 23, 1904, being the day after its receipt at Port Arthur by the plaintiff. I therefore instruct you that you must disregard the second affirmative defense set up by defendant.

(3) The third affirmative defense set up by defendant in its answer, is that it was, by the custom of bankers, made the duty of the plaintiff to look after, protect and care for the flour represented by the bill of lading upon its arrival at Port Arthur, and that it was the duty of the plaintiff to warehouse the flour and insure the same, and that it was the duty of the plaintiff by reason of the instructions given plaintiff by defendant, and by reason of the custom among bankers, not to permit the said flour to be appropriated by Clarkson & Company, or any one else.

In this connection I charge you that there were no instructions given by defendant to plaintiff concerning the care of the flour, and that the only instructions given were to hold the documents against payment; that it was not the duty of the plaintiff to either look after, protect or care for the flour represented by the bill of lading upon its arrival at Port Arthur, or at all, and that it was not the duty of the plaintiff to warehouse the flour, or to insure the same, and that it was not the duty of the plaintiff to prevent the said flour being appropriated by Clarkson & Company, or by any one else."

9. "The evidence shows that the only instructions given to plaintiff by defendant, in regard to the draft and accompanying



WHEREFORE the said plaintiff, plaintiff in error, prays that the judgment of the trial court be reversed and that the said trial court be directed to grant a new trial of said cause.

T. L. STILES,  
CHICKERING & GREGORY,  
DORR & HADLEY,

Attorneys for Plaintiff in Error, Plaintiff Below.

Indorsed: Assignment of Errors. Filed in the U. S. District Court, Western Dist. of Washington, July 5, 1912. A. W. Engle, Clerk. By S., Deputy.

*In the District Court of the United States for the Western  
District of Washington, Northern Division.*

RUSSO-CHINESE BANK (a Corpora- tion),	}	No. 1517. (Circuit)
<i>Plaintiff in Error.</i>		
vs.		
NATIONAL BANK OF COMMERCE OF SEATTLE,	}	
<i>Defendant in Error.</i>		

### WRIT OF ERROR (Original).

*The President of the United States, to the Honorable, the Judge  
of the District Court of the United States for the Western  
District of Washington, Greeting:*

Because in the record and proceedings, and also in the rendition of the judgment upon a plea which is in the said court before you, or some of you, between the Russo-Chinese Bank, a corporation, plaintiff in error, and National Bank of Commerce of Seattle, defendant in error, manifest error hath happened, to the great prejudice of the said Russo-Chinese Bank, plaintiff in error, as by its complaint and assignment of errors appears:

We, being willing that error, if any there hath been, should



be duly corrected and full and speedy justice done to the parties aforesaid, in this behalf do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, on the 4th day of August, next, and within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid, being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, the 5th day of July, 1912.

(Seal)

A. W. ENGLE,

Clerk of the United States District Court for the  
Western District of Washington.

F. A. SIMPKINS, Deputy.

Indorsed: Copy. No. 1517. In the United States District Court, Western District of Washington, Northern Division. Russo-Chinese Bank, Plaintiff, vs. National Bank of Commerce. Seattle, Defendant. Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, July 5, 1912. A. W. Engle, Clerk. By S., Deputy. T. L. Stiles, Attorney for Plaintiff. Address: 410 Equitable, Tacoma, Wash. A place within the said District at which service of all subsequent papers, other than writs and process may be made.

*In the District Court of the United States for the Western  
District of Washington, Northern Division.*

RUSSO-CHINESE BANK (a Corpora- tion),	}	No. 1517. (Circuit)
<i>Plaintiff in Error,</i>		
vs.		
NATIONAL BANK OF COMMERCE OF SEATTLE,	}	
<i>Defendant in Error.</i>		

CITATION IN ERROR. (Copy)

*The President of the United States, to National Bank of Com-  
merce of Seattle, and Messrs. Kerr & McCord and ——  
De Steiguer, Attorneys:*

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the city of San Francisco, within thirty days from the date of this writ, pursuant to a writ of error filed in the office of the clerk of the Circuit Court of the United States for the Western District of Washington, sitting at Seattle, wherein you are defendant and defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States of America, this 5th day of July, 1912.

C. H. HANFORD, Judge.

RETURN ON SERVICE OF WRIT.

United States of America,  
Western District of Washington—ss.

I hereby certify and return that I served the annexed Citation in Error on the therein-named Kerr & McCord, attorneys, by handing to and leaving a true and correct copy thereof with J. A. Kerr, a member of the firm of Kerr & McCord, attorneys,

personally, at Seattle, in said District, on the 12th day of July, A. D. 1912.

JOSEPH R. H. JACOBY, U. S. Marshal.

By Fred M. Lathe, Deputy.

July 12, 1912.

Fees \$2.12.

### RETURN ON SERVICE OF WRIT.

United States of America,

Western District of Washington—ss.

I hereby certify and return that I served the annexed Citation in Error on the therein-named National Bank of Commerce of Seattle by handing to and leaving a true and correct copy thereof with J. A. Swalwell, Vice-Pres. of the within named National Bank of Commerce of Seattle, personally at Seattle, in said District, on the 12th day of July, A. D. 1912.

JOSEPH R. H. JACOBY, U. S. Marshal.

By Fred M. Lathe, Deputy.

July 12, 1912.

Fees \$2.12.

Indorsed: Original. No. 1517. In the United States District Court, Western District of Washington, Northern Division. Russo-Chinese Bank, Plaintiff, National Bank of Commerce of Seattle, Defendant. Citation in Error. Filed in U. S. District Court, Western Dist. of Washington, July 5, 1912. A. W. Engle, Clerk. By S., Deputy. T. L. Stiles, Attorney for Plaintiff. Address 410 Equitable Building, Tacoma, Wash. A place within the said District at which service of all subsequent papers, other than writs and process, may be made.

*United States District Court for the Western District of Wash-  
ington, Northern Division.*

RUSSO-CHINESE BANK,

*Plaintiff,*

VS.

No. 1517

NATIONAL BANK OF COMMERCE  
OF SEATTLE,

(Circuit)

*Defendant.*

PRAECIPE FOR TRANSCRIPT.

*To the Clerk of the above-entitled Court:*

You will please prepare Transcript in the above-entitled case on Writ of Error to the Circuit Court of Appeals and include the following:

1. Complaint.
2. Amended Answer.
3. Reply.
4. Judgment.
5. Order Extending Time to File Bill of Exceptions.
6. Bill of Exceptions.
- 6½. Two Orders and two Stipulations as to Amendments to Bill of Exceptions.
7. Order Settling Bill of Exceptions.
8. Petition for Writ of Error.
9. Order Allowing Writ of Error.
10. Bond.
11. Assignment of Errors.
12. Writ of Error and Copy and Proof of Service.
13. Citation and Copy and Proof of Service.
14. Praeceptum for Transcript of Record.

**T. L. STILES,  
DORR & HADLEY,  
CHICKERING & GREGORY,**  
Attorney for Russo-Chinese Bank.

Endorsed: Praeceptum for Transcript of Record. Filed U. S. District Court, Western District of Washington, July 5, 1912.

A. W. ENGLE, Clerk.

By S., Deputy.

*In the District Court of the United States for the Western District of Washington, Northern Division.*

RUSSO-CHINESE BANK, a Corporation,

*Plaintiff in Error,*

vs.

NATIONAL BANK OF COMMERCE  
OF SEATTLE,

*Defendant in Error.*

No. 1517.

# CLERK'S CERTIFICATE TO TRANSCRIPT OF RECORD.

United States of America,

Western District of Washington—ss.

I, Frank L. Crosby, Clerk of the District Court of the United States, for the Western District of Washington, do hereby certify the foregoing 271 printed pages, numbered from 1 to 271, inclusive, to be a full, true and correct copy of so much of the record and proceedings in the above and foregoing entitled cause, as is called for by praecipe of Attorney for Plaintiff in Error, as the same remain of record and on file in the office of the Clerk of said Court, and that the same constitute the return to the annexed Writ of Error.

I further certify that I annex hereto and herewith transmit the original Writ of Error and Citation.

I further certify that the cost of preparing and certifying the foregoing return to Writ of Error is the sum of \$315.35, and that the said sum has been paid to me by T. L. Stiles, Esq., Attorney for Plaintiff in Error.

In testimony whereof, I have hereunto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 3rd day of September, 1912.

FRANK L. CROSBY, Clerk.

By F. A. SIMPKINS, Deputy.

*In the District Court of the United States for the Western District of Washington, Northern Division.*

<p>RUSSON-CHINESE BANK, a Corporation,  <i>Plaintiff in Error,</i></p>	<p>No. 1517.          (Circuit)</p>
<p>vs.</p>	
<p>NATIONAL BANK OF COMMERCE          OF SEATTLE,  <i>Defendant in Error.</i></p>	

### WRIT OF ERROR.

*The President of the United States to the Honorable, the Judge of the District Court of the United States for the Western District of Washington, Greeting:*

Because in the record and proceedings, and also in the rendition of the judgment upon a plea which is in the said Court before you, or some of you, between the Russo-Chinese Bank, a corporation, plaintiff in error, and National Bank of Commerce of Seattle, defendant in error, manifest error hath happened, to the great prejudice of the said Russo-Chinese Bank, plaintiff in error, as by its complaint and assignment of errors appears:

We, being willing that error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid, in this behalf do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, on the 4th day of August, next, and within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid, being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of



right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, the 5th day of July, 1912.

(Seal)

A. W. ENGLE,  
Clerk of the United States District Court  
for the Western District of Washington.

F. A. SIMPKINS, Deputy.

Indorsed: Original. No. 1517. In the United States District Court, Western District of Washington, Northern Division. Russo-Chinese Bank, Plaintiff, vs. National Bank of Commerce, Seattle, Defendant. Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, July 5, 1912. A. W. Engle, Clerk. By. S., Deputy. T. L. Stiles, Attorney for Plaintiff. Address: 410 Equitable, Tacoma, Wash. A place within the said District at which service of all subsequent papers, other than writs and process may be made.

*In the District Court of the United States for the Western District of Washington, Northern Division.*

RUSSO-CHINESE BANK, a Corporation,	} No. 1517. (Circuit)
<i>Plaintiff in Error,</i>	
vs.	
NATIONAL BANK OF COMMERCE OF SEATTLE,	
<i>Defendant in Error.</i>	

#### CITATION IN ERROR (Original).

*The President of the United States, to National Bank of Commerce of Seattle, and Messrs. Kerr & McCord and ——— De Steigueur, Attorneys:*

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the city of San Francisco, within thirty days

from the date of this writ, pursuant to a writ of error filed in the office of the clerk of the Circuit Court of the United States for the Western District of Washington, sitting at Seattle, wherein you are defendant and defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States of America, this 5th day of July, 1912.

C. H. HANFORD, Judge.

### RETURN OF SERVICE OF WRIT

United States of America,  
Western District of Washington—ss.

I hereby certify and return that I served the annexed Citation in Error on the therein-named Kerr & McCord, attorneys, by handing to and leaving a true and correct copy thereof with J. A. Kerr, a member of the firm of Kerr & McCord, attorneys, personally at Seattle, in said District, on the 12th day of July, A. D. 1912.

JOSEPH R. H. JACOBY, U. S. Marshal.

By Fred M. Lathe, Deputy.

July 12, 1912.

Fees \$2.12.

### RETURN OF SERVICE ON WRIT.

United States of America,  
Western District of Washington—ss.

I hereby certify and return that I served the annexed Citation in Error on the therein-named National Bank of Commerce of Seattle by handing to and leaving a true and correct copy thereof with J. A. Swalwell, Vice-Pres. of the within named National Bank of Commerce of Seattle, personally at Seattle, in said District, on the 12th day of July, A. D. 1912.

JOSEPH R. H. JACOBY, U. S. Marshal.

By Fred M. Lathe, Deputy.

July 12, 1912.

Fees \$2.12.

Indorsed: Copy. No. 1517. In the United States District Court, Western District of Washington, Northern Division. Russo-Chinese Bank, Plaintiff, National Bank of Commerce of Seattle, Defendant. Citation in Error. Filed in the U. S. District Court, Western Dist. of Washington, July 5, 1912. A. W. Engle, Clerk. By S., Deputy. T. L. Stiles, Attorney for Plaintiff. Address 410 Equitable Building, Tacoma, Wash. A place within the said District at which service of all subsequent papers other than writs and process, may be made.



2  
No. 2182

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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RUSSO-CHINESE BANK (a corporation),  
*Plaintiff in Error,*

vs.

NATIONAL BANK OF COMMERCE OF  
SEATTLE, WASHINGTON (a corpora-  
tion),  
*Defendant in Error.*

## BRIEF FOR PLAINTIFF IN ERROR

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This case has been once heard by this court on a previous appeal, and its decision is reported in 187 Fed. Rep. 80. This report contains a full and accurate statement of the facts in the case as disclosed by plaintiff's testimony at the first trial. This evidence was largely by depositions, and the same depositions were read at the second trial.

It would subserve no useful purpose to again repeat this evidence *in extenso*, which is digested on pages 81-85 of the aforesaid volume.

For visual reasons and for the convenience of the Court we here give a summary.

The plaintiff in error, whom we shall hereafter designate as plaintiff, is a banking corporation organized under the laws of the Russian Empire with a head office in St. Petersburg and some forty or fifty branches in the principal cities of the world, including Port Arthur, Shanghai and Vladivostok.

Defendant in error, whom we shall hereafter designate as defendant, is a national banking corporation, conducting its bank at Seattle, Washington. For some years it had been a correspondent of the Port Arthur branch, the business between the two banks being mainly the remittance of drafts by defendant to the Port Arthur branch for collection. These drafts were regularly drawn by American shippers of goods to their customers in the Orient, with bills of lading attached.

Centennial Mill Company was a corporation conducting milling operations at Seattle and engaged in the business of consigning large cargoes of flour to purchasers in the Orient.

Clarkson & Co. was a company registered under the Russian law of which David M. Clarkson was practically the sole owner, with head office at Vladivostok and various branch offices, one of which was at Port Arthur.

On December 10, 1903, Centennial Mill Company delivered to the Boston Steamship Company and



Boston Tow Boat Company at Seattle 35,312 quarter-sacks of flour, for shipment ex Steamer Hyades to Clarkson & Co. at Port Arthur. This flour had been sold to Clarkson on terms of 90 day draft at \$4.10 per barrel, amounting to \$36,194.80. Clarkson & Co. were also the agents at Port Arthur of the Boston Steamship Company and the Boston Tow Boat Company.

A draft was drawn by Centennial Mill Company on Clarkson & Co. at Port Arthur for the purchase price of the flour, viz.: \$36,194.80, with exchange and collection charges, payable in 90 days after sight, to National Bank of Commerce at Seattle, the defendant. The Centennial Mill Company procured insurance on the flour in the sum of \$40,000 and thereupon took this draft on Clarkson & Co., the bill of lading, the insurance policy, and also an invoice from Centennial Mill Company to Clarkson & Co., and delivered them to the defendant bank, which thereupon discounted the draft and paid the mill company the value thereof. The defendant bank then sent this draft, with the other documents, by letter dated December 11, 1903, to the Port Arthur branch, and this was received by the latter upon January 22, 1904, according to the Gregorian or new style calendar. The Port Arthur branch acknowledged the receipt of this letter and documents on the same day and presented the draft to Clarkson & Co. for acceptance on the next day, January 23rd. It was accepted by Clarkson & Co. on January 30th

and the Seattle bank notified by letter of that fact on the same date. The draft being 90 days after sight, matured on April 30, 1904. It was not paid, and upon the expiration of the two days' grace allowed by the Russian law was given to the notary public at Port Arthur for protest, and it was protested on the following day, May 3, 1904.

The Russian-Japanese War was declared on February 10, 1904, but military operations had been conducted prior to that time, and on February 9th a complete blockade of Port Arthur on the water side had been effected by the Japanese Fleet; this blockade was completed on the land side about May 3rd, so that when the draft and protest were received by the bank from the notary, communication between Port Arthur and the outside world had been completely cut off. The Port Arthur branch under the circumstances decided to keep the documents for a short time, awaiting the opening of communications. When it was seen that conditions would not immediately improve, they mailed the draft on May 26, 1904, accompanied by a letter (page 76) stating that it had been protested for non-payment, and that the documents were retained, pending receipt of instructions.

The Japanese seized Port Arthur on January 2, 1905, when they took possession of all the papers and documents belonging to the Port Arthur branch, and retained possession of them until about March, 1906, when they were all returned to the Russo-

Chinese Bank, and by them taken to their home office in St. Petersburg. During the time that the Japanese had possession of these documents the plaintiff bank had no access to them.

After Port Arthur had been invested by the Japanese forces the Seattle bank began to make numerous inquiries concerning the drafts of Clarkson & Co. These letters grew more and more positive in tone and were addressed to the home office of the Russo-Chinese Bank in St. Petersburg. The latter replied that it was unable to correspond with the Port Arthur branch; that it was entirely ignorant of the condition of affairs there, but would investigate the subject as soon as possible. The Seattle bank continued to reiterate that it had positive information that Clarkson & Co. had paid this draft, that the Port Arthur branch had failed to present the draft for acceptance and finally, on October 12, 1904, concluded by saying that it would take steps to enforce their rights in this country unless they were paid the amount of the draft.

On November 9, 1904, the plaintiff bank, being still in ignorance of the true facts and fearing that litigation would ensue in the United States which would involve its branches there and which it would be unable to defend on account of inability to secure its papers, sent the Seattle bank (p. 92) the amount of the draft, viz.: \$36,013.70, with a letter in which it was stated that in case this remittance proved not to have been paid by Clarkson & Co., then that the

Seattle bank was to be held responsible to refund. To this the Seattle bank replied on December 5, 1904 (p. 93), stating that there was a balance still due of \$2,298.49 for interest and charges, and that they, upon return to them of both sets of bills showing that the draft had not been paid, would reimburse the plaintiff bank in the sum paid, provided that the Seattle bank was in no wise injured by the fact that the Port Arthur branch had indefinitely held the bills after their maturity. To this St. Petersburg replied on December 29, 1904 (p. 94), enclosing its check for the additional amount of \$2,298.49 and again repeating that in case the remittance from Clarkson & Co. proved not to have been received, that the Seattle bank would refund both sums; and to this the Seattle bank replied (pp. 95-6) acknowledging the receipt of the second check and stating that its guaranty contained in its letter of December 5th should also cover this amount.

When the documents were received from the Japanese government, plaintiff bank discovered that the draft had not been paid, but on the contrary that the bills of lading and other documents were still in the possession of the Port Arthur branch and that the draft had been mailed protested for non-payment to the Seattle bank on May 26, 1904. The St. Petersburg bank thereupon wrote requesting the Seattle bank to repay it the amount so paid, which the Seattle bank refused to do.

Prior to this suit all the documents were sent the Puget Sound National Bank at Seattle for delivery to defendant upon payment. The documents were examined by defendant (p. 129) and found there with the exception of the draft.

This suit is to recover judgment for the amount of the sums thus sent, with interest and costs.

The foregoing facts appear from the depositions read in evidence by the plaintiff at both trials. In addition, the plaintiff developed from the witness R. R. Spencer, manager of the defendant bank, that the two banks had had transactions affecting the Centennial Mill Company and Clarkson & Co. for some years (122-135), and that the letter received from the Port Arthur branch which acknowledged receipt of the draft (page 123) was the usual form in which it had been accustomed to receive acknowledgments of drafts in the past. This letter stated among other things that if the goods were to be stored by the Port Arthur branch and fire insurance covered, instructions to that effect must be given by the sending bank.

Spencer also testified that on November 2, 1904, the Centennial Mill Company paid back to the Seattle bank the amount for which it had discounted the draft when first given it, so that at no time since has the defendant bank been out any money on account of these transactions. He further testified as to the custom of banks taking care of goods, which we shall refer to more specifically hereafter.

The plaintiff also at the second trial produced as a witness H. F. Ostrander, who testified (p. 134) that he represented the Centennial Mill Company in the Orient from 1901 to 1905; that Port Arthur was a city of between 30,000 and 40,000 inhabitants at that time and was a place of importance in supplying goods to the Russian troops; that the Centennial Mill Company at that time was doing business with Clarkson & Co. to the extent of several hundred thousand dollars a year, in flour; that he was in Port Arthur late in January and early in February, 1904, on business of the Centennial Mill Company, and that he there visited Clarkson & Co.; that the reputation of Clarkson & Co. was first class as far as he could find out, and that he knew and that it was a well-known fact that Clarkson & Co. were the agents of the steamship companies; that he gave the bank no instructions concerning the care of the flour of the cargo in question, although the Hyades had already arrived and he saw some of the flour in the warehouse of Clarkson & Co.

The defendant produced two witnesses, A. T. Short, whose testimony was given orally, and W. S. Davidson, whose deposition was read. Both these men were connected with Clarkson & Co. prior to 1904. The time when that connection was severed was disputed, Clarkson and Davidson saying that Short left the firm in December, 1903 (pp. 111-195), and he testifying that he left it on February 4, 1904 (p. 154). Short testified that he accepted the draft



in question on behalf of Clarkson & Co., and that an arrangement was made between him and the manager of the Port Arthur branch by which he gave a letter of guaranty to the bank to the effect that Clarkson & Co. acknowledged the title of the bank to the flour and would deposit any money received therefrom in the bank. Neither this letter nor a copy was produced. He did not know if any of the flour was ever actually sold or disposed of by Clarkson & Co. under this arrangement.

We refer to this evidence of Short more at length hereafter.

The testimony of the witness Davidson differs materially from that of Short. He stated (pp. 183-184) that a custom existed between the Port Arthur branch and Clarkson & Company by which the *bills of lading were delivered to Clarkson & Company when the draft was accepted*. He stated upon cross-examination (p. 209) that he had not stated that Clarkson was allowed to take deliveries of cargo without production of the bill of lading.

The bills of lading in the case were not delivered by the Port Arthur branch and were in its possession until they were filed in court in this case. It therefore appears that the custom to which Davidson testified was not carried out in the present instance.

Davidson knew nothing of the shipment ex Hyades. He referred to the shipment ex Pleides which reached Port Arthur after the Hyades had

sailed on her homeward voyage. He did not know if the custom he referred to was followed in the present instance (p. 188).

This witness Davidson also cleared up the transaction which is frequently referred to by other witnesses, but which has no legitimate bearing upon this case. This concerned an alleged sale of flour by Clarkson & Co. to M. Ginsburg & Company. It was claimed by the defendant that the Port Arthur branch had been negligent concerning this sale and that the proceeds resulting therefrom should have been paid on the draft in question. It developed however from the testimony of Clarkson and of Davidson that after Davidson had been discharged by Clarkson he attempted to sell to Ginsburg & Co. a quantity of flour for 67,000 roubles. This flour was not a part of the Hyades' cargo, but a part of the Pleiades' cargo, which arrived at Port Arthur on February 7, 1904 (p. 204). The Hyades arrived at Port Arthur January 16th and left Port Arthur on her homeward voyage January 22nd (p. 122). Davidson admitted that he had attempted to make this sale with two separate bills of sale, one at 2 roubles per sack and the other at 2-4 roubles per sack. The lower price he said was sufficient to meet the draft and the excess Davidson put into his pocket, where it now remains (pp. 202-203).

On account of this transaction Davidson was discharged by Clarkson (pp. 114-117).

Davidson's own statement (pp. 201-203) makes interesting reading.

This 67,000 roubles resulting from the sale of the Pleiades' flour was paid into the Port Arthur branch in discharge of two other drafts drawn by the Centennial Mill Company, one for \$16,155.20 and the other for \$4,136.00, and this money was sent by the Port Arthur branch to the Seattle bank.

The Ginsburg transaction has therefore no connection with the draft in suit. It is here mentioned because Davidson frequently refers to the bank's consenting to a sale but *he always referred to the shipment arriving February 8th.*

At the first trial of this case a judgment of nonsuit was entered upon the ground that the plaintiff had failed to show that it had returned the draft to the Seattle bank, and upon the theory that this was an action upon an express contract and that the return of all the documents was a condition precedent to plaintiff's recovery. This judgment was reversed by this court upon the ground that there was sufficient evidence to show that the protested draft had been mailed back to the Seattle bank and that the facts shown warranted a recovery either upon an express contract or upon an implied agreement to restore money paid to the defendant under a mistake of fact.

At the second trial the jury returned a verdict in favor of the defendant, and answered, in response to

a special issue presented to it, that the draft of December 10, 1904, had been paid.

Upon this appeal we shall rely upon claimed error in numerous rulings in the admission and exclusion of evidence; but as more important and as a necessary guide to any subsequent trial, we first invite the court's attention to what we claim to be a fundamental error on the part of the trial court concerning the legal duties and obligations of the collecting bank. We shall claim that the theory of the trial court to the effect that the Port Arthur branch was under the circumstances the actual owner of the flour and charged with the duty of keeping it safely insured and warehoused, was erroneous. We shall next discuss the effect of the special verdict.

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### **Argument.**

#### **I.**

**THE COURT ERRED, (A) IN INSTRUCTING THE JURY THAT THE PORT ARTHUR BRANCH BECAME INVESTED WITH THE TITLE AND OWNERSHIP OF THE FLOUR; AND (B) IN REFUSING TO INSTRUCT THAT ITS RESPONSIBILITY CONCERNED THE DOCUMENTS, AND NOT THE GOODS.**

The court instructed the jury as follows (*italics ours*):

INSTRUCTIONS GIVEN:

“When the Russo-Chinese Bank at Port Arthur received the draft and the accompanying documents endorsed as they all were, and

undertook the business of presenting and collecting the draft, it became invested with the title and ownership of the flour as to all of the world except the National Bank of Commerce of Seattle; it had the legal right to sell and dispose of that flour and to receive the proceeds subject to its duty as an agent to account to the National Bank of Commerce for it. In receiving the documents and undertaking the business in that manner, without special instructions in regard to the care of the flour and the protection of the National Bank of Commerce, it was left free to deal with the flour as an owner might. It was obligated as an agent to act in good faith to protect the rights of the National Bank of Commerce in the collection of the draft. *It was authorized to do whatever was necessary in the matter of incurring expense, which would be chargeable against the property, and to be compensated out of the property in its hands, and it was required to deal with the property in the same way that an intelligent and prudent owner of property would deal with his own property, to act for and in place of the National Bank of Commerce in handling the business there at Port Arthur as the National Bank of Commerce would have acted if it had been there, and in a position to act for itself. As the agent for the owner it was obligated to account for the amount of the draft, to account for the security which the bill of lading constituted, and it cannot be excused from obligation to account by saying that the flour disappeared without its knowledge, and required the defendant in this case in order to fasten an obligation upon it, to prove that it was negligent.* A principal does not have to prove those things in regard to property or valuables that go into the hands of an agent; the agent must render an account in order to

be cleared of obligation and liability. That is the rule that is to be applied in this case in determining whether the plaintiff in this case paid out money which it was not obligated to pay to the defendant on account of the draft" (pp. 222-223).

"It is contended by the plaintiff that on the 11th day of December, 1903, the Centennial Mill Company of Seattle drew a draft upon Clarkson & Company at Port Arthur for \$36,194.80, payable to the order of the National Bank of Commerce of Seattle. This draft was secured by a bill of lading issued by a steamship company covering about 36,000 sacks of flour shipped by the Centennial Mill Company to Port Arthur. The Centennial Mill Company was named as consignor in the bill of lading and the flour was to be delivered upon the shipper's order. Insurance policies upon the flour were also issued to the Centennial Mill Company and constituted a part of the collateral for the draft. The draft above mentioned, the bill of lading, and the insurance policies, were indorsed in blank and sent by the National Bank of Commerce of Seattle to the Russo-Chinese Bank at Port Arthur, with instructions to deliver the collateral, or documents, upon the payment of the draft. *By virtue of these endorsements and transfers the legal title to the draft and the documents and to the flour in question passed to and became vested in the Russo-Chinese Bank, and I instruct you that as a matter of law it was in the power of the plaintiff to handle, control, sell and dispose of such flour in any way that was deemed expedient by the plaintiff*" (p. 227).

The court erred in refusing the following instructions requested by plaintiff:



## INSTRUCTIONS REFUSED:

"I charge you that the Russo-Chinese Bank in this case, in acting as the collecting bank of the draft in question, and as the agency to transmit the documents in question, was bound to use only reasonable and ordinary care and diligence in the exercise of this relationship. In the absence of special instructions, it was not obliged to insure the flour, or see that the same was stored, or to make any inquiries concerning the custody and disposition of the flour. In the absence of special instructions its sole responsibility, as such collecting bank, was to preserve the documents safely, to promptly present the draft for acceptance, and upon non-payment, to protest the same.

"The evidence in this case shows that the Russo-Chinese Bank did comply with all of the foregoing obligations imposed upon it by its relation, and that there was no special instructions given it by the National Bank of Commerce of Seattle, except to hold the documents against payment, which the Russo-Chinese Bank did. I therefore instruct you that there is no evidence of negligence against the Russo-Chinese Bank, so far as the disposition of the flour was concerned," which charge was by the court refused and plaintiff duly excepted and its exception was allowed (pp. 214, 215).

"A collecting bank, in the absence of special instructions, has no responsibility concerning the goods. Its sole obligation is with the documents," which charge was by the court refused and plaintiff duly excepted and its exception was allowed (p. 215).

"I charge you that, in any event, the Russo-Chinese Bank in this matter was only bound to use reasonable and ordinary care and skill. It was not bound to use any extraordinary efforts

in connection with the said documents and shipment. Thus, for example, there was no duty imposed upon the Russo-Chinese Bank to investigate as to who were the agents of the steamship line at Port Arthur, or as to whether or not Clarkson & Company were the agents of the steamship line, and there was, therefore, no negligence on the part of the Russo-Chinese Bank in failing to notify the National Bank of Commerce of Seattle that Clarkson & Company were the agents of the steamship line at Port Arthur," which charge was by the court refused and plaintiff duly excepted and its exception was allowed (p. 215).

"The third affirmative defense set up by the defendant in its answer, is that it was, by the custom of bankers, made the duty of the plaintiff to look after, protect and care for the flour represented by the bill of lading upon its arrival at Port Arthur, and that it was the duty of the plaintiff to warehouse the flour and insure the same, and that it was the duty of the plaintiff, by reason of the instructions given plaintiff by defendant, and by reason of the custom among bankers, not to permit the said flour to be appropriated by Clarkson & Company, or any one else.

"In this connection I charge you that there were no instructions given by defendant to plaintiff concerning the care of the flour, and that the only instructions given were to hold the documents against payment; that it was not the duty of the plaintiff to either look after, protect or care for the flour represented by the bill of lading upon its arrival at Port Arthur, or at all, and that it was not the duty of the plaintiff to warehouse the flour, or to insure the same, and that it was not the duty of the plaintiff to prevent the said flour being appropriated

by Clarkson & Company, or by any one else," which charge was by the court refused and plaintiff duly excepted and its exception was allowed (pp. 216, 217).

"The evidence shows that the only instructions given to plaintiff by defendant, in regard to the draft and accompanying documents, was to hold them against payment. I instruct you that no custom or usage could impose additional obligations upon plaintiff in this regard than those imposed by this instruction from defendant to plaintiff. Also that defendant did not instruct plaintiff to insure or store the flour and that no custom or usage could impose this obligation upon plaintiff," which charge was by the court refused and plaintiff duly excepted and its exception was allowed (p. 217).

"If you shall believe that the Russo-Chinese Bank was negligent in any respect in regard to its duties in the premises, then I charge you that it is liable, if at all, only for such actual damages as were directly suffered by the Seattle Bank by reason of such negligence. That is, even if you believe that it was the duty of the plaintiff to insure and store this flour and take it out of the control of Clarkson & Company, but that nevertheless if plaintiff had done these things, the flour would have been lost or destroyed by reason of the war conditions at Port Arthur, then I instruct you that such negligence cannot be considered by you, but that plaintiff is entitled to recover regardless of such negligence," which charge was by the court refused and plaintiff duly excepted and its exception was allowed (pp. 217, 218).

"In considering the duty of the Russo-Chinese Bank to notify the National Bank of Commerce of Seattle of the fact that Clarkson & Company were the agents of the steamship com-

pany, I instruct you that if you believe that the Russo-Chinese Bank did not, at that time, know such fact, or if you believe that the Centennial Mill Company, or its representatives, did, at that time, know such fact, then there was no necessity for the plaintiff to give any notice to the defendant concerning the same.

“I furthermore instruct you that there was no duty imposed upon the plaintiff whatever, in connection with this transaction, until after it had received the draft in question, which the evidence shows was on January 22, 1904; that unless the bank had special cause to believe that, at that time, Clarkson & Company were insolvent, or intended in some way to illegally remove the flour from its warehouse, there was no duty whatever imposed upon the plaintiff bank to send any notice of these things to the defendant.

“I furthermore instruct you in this connection, that if you believe that the representative of the Centennial Mill Company was present in Port Arthur during a portion of the time that this flour was in the warehouse of Clarkson & Company, and if the Russo-Chinese Bank knew that this representative was so present on the business of the Centennial Mill Company, then there was no obligation imposed upon the Russo-Chinese Bank to give any notices or make any inquiries concerning the disposition of the flour, because it had a right to believe that all of such matters were being attended to by the representative of the Centennial Mill Company,” which charge was by the court refused and plaintiff duly excepted and its exception was allowed (p. 219).

“I instruct you that the contract between the Boston Towboat Company and the Centennial Mill Company was evidenced by a contract in

writing, to-wit: the bill of lading, and I instruct you further that such written contract could not be altered or varied by parole or oral arrangements which were not executed," which charge was by the court refused and plaintiff duly excepted and its exception was allowed (p. 219).

It is submitted that the court, by the above instructions and by its refusal to give those requested, placed before the jury an erroneous statement of the law as to the relations existing between the plaintiff and defendant banks; that the Port Arthur branch was not the owner either of the documents or the flour for two reasons: (a) That the relationship between these banks was that of principal and agent, and not of vendor and vendee; and, (b) Because the documents were accompanied by an invoice or a bill of sale from Centennial Mill Company to Clarkson & Co., which conclusively shows that the Port Arthur branch was acting as a collection agent only and that it could not sell the flour to anyone other than Clarkson.

As to the general duties of a collecting bank under like circumstances it is said in *Grant on Banking*, page 53:

"The duty of the collecting banker as to bills and cheques paid in for collection is to present them for acceptance when necessary, and for payment to the proper person. The collecting banker must also give notice of dishonor with regard to any bills and cheques dishonored on presentation by him."

*Morse on Banking* (4th Ed.), Sec. 217, says:

“Endorsement for collection does not give the bank title to the paper, nor render the depositor liable as an endorser, nor guarantee the drawer’s signature. But the bank is deemed the holder, to receive and transmit notice of non-payment.”

Sec. 218. “A bank contracts to use due diligence in the business of collection, and it is bound only to reasonable care and diligence in the discharge of its assumed duties. In a case of doubt its best judgment is all the principal has a right to require; *especially if the doubt arises by reason of the neglect of the principal to give specific instructions*, the bank will be acquitted even if its discretion be exercised erroneously.”

Sec. 219. “The bank’s duty is to act for its principal’s best interests and to preserve the liability of all parties to him.”

In *Second National Bank v. Bank of Alma*, 138 S. W. Rep. 472, a draft with bill of lading attached had been sent the bank with instructions to deliver it upon payment. The court said:

“By accepting for collection the draft accompanied by the bill of lading, the plaintiff only became the agent of the Judge Machine Company for that purpose, and it did not thereby become the true owner of the draft or of the machine which was covered by the bill of lading accompanying the draft.”

*Nebraska &c. v. First National Bank*, 110 N. W. Rep. 1019.

In this case the court was called upon to pass upon the question as to the nature of the title to a



draft and bill of lading sent a collecting bank. It was said:

“We adopt, without qualification, the contention of counsel for appellant that the principles of the law merchant are without applicability to the case made by the petition, and that the latter is to be decided in accordance with the rules of law governing the relation of principal and agent, and, having adopted it, there appears to us no doubtful problem for solution. The functions and obligations of a collecting agent, merely as such, do not differ essentially or characteristically from those of a messenger boy. What may be his moral or social standing or financial responsibility are, so long as he is free from knowledge or participation in any wrong-doing by his principal, matters of no importance. *He performs his whole duty by delivering what he is charged with delivering and receiving what he is intrusted to receive, in exchange, and by disposing of the latter as his principal has directed. It is not only not his duty, but it would be an impertinence by him, to inquire into the value, genuineness, or validity of either the one article or the other*” (p. 1020).

In *Hambro v. Casey*, 110 U. S. 216, the supreme court said that a collecting bank holding a draft sent it for collection was the holder of the bills,

“but in no legal sense the owners, though it may be their lien is for more than can be collected from the drawers or drawees.”

In *Balbach v. Frelinghuysen*, 15 Fed. Rep. 675, it was held that a check deposited in a bank by its

customer for collection does not become the property of the bank, but the bank continues to be the agent of the customer until the collection of the check, which remains in the meantime the property of the depositor. The following quotation from *Morse on Banking* is approved:

“Where the customer deposits in the bank commercial paper for collection, at the same time indorsing it over to the bank, the parties understanding that it is only intended by the indorsement to put the paper in such shape that the bank can collect upon it, the title in the paper does not thereby pass to the bank, nor does the bank owe the amount to the customer until such time as the collection is actually consummated. Neither is this strict right of the bank curtailed or altered simply because a practice has been allowed to prevail by which it has allowed the depositor to draw against deposits of paper for collection before the collection has been actually made. This is a mere gratuitous privilege, allowed by the bank, which does not grow into a binding legal usage. Thus, it is very common for depositors to deposit checks with their banks, and to draw against them on the same day checks of their own, which may be presented for payment before the bank has had an opportunity to collect upon the deposited checks. In such cases banks are frequently wont to honor such checks of their customers upon the confidence that the deposited checks will be duly paid. But this habit of the banks is a pure favor, and if there be no distinct understanding to change the natural effect of such dealing, its long continuance gives no real right whatsoever to the depositor to demand its continuance or its practice in any individual case wherein the bank may, for any arbitrary

reason, see fit to withhold that favor. *Scott v. Ocean Bank*, 23 N. Y. 289. In England, a decision given by Lord Ellenborough (9 East, 21) went much further even than this. Bills, not yet due, were sent to a country banker to collect. According to the custom of country bankers these were actually entered in the banker's own books to the depositor's credit, with the proper discount, and he was thereafter entitled to draw against this credit before the actual collection. Upon the subsequent failure of the banker, before the collection, it was held that the title in the bills had not passed to him, and that the depositor should recover them specifically, or their amount, if the bankrupt's assignee had already made the collection" (pp. 683-684).

In other words, this case holds that even if the Port Arthur branch had upon receipt of these documents placed the amount of the draft to the credit of the Seattle bank, that nevertheless the title in the documents would not have passed to the Port Arthur branch and in the event of its bankruptcy could have been recovered specifically by the Seattle bank.

In *Wisconsin &c. Bank v. Bank of British North America*, 21 Upper Canada Queen's Bench Reports 284, a firm called Thomas Clarkson & Co. in Milwaukee drew a draft upon Clarkson, Hunter & Co. in Toronto and gave it to the plaintiff bank, together with a bill of lading, for ten thousand bushels of wheat; and these documents being endorsed by the plaintiff bank were sent to the defendant bank

in Toronto to hold them as security for the due payment of the bill of exchange. The bill of exchange was presented and accepted in due course, but not paid. The bill of lading was delivered by the Toronto bank to Clarkson, Hunter & Co. upon acceptance of the draft. The question involved was as to the right of the collecting bank to deliver the bill of lading when the draft was accepted, and prior to payment. It was held, in the absence of specific instructions, that the collecting bank was justified in so doing, establishing the rule subsequently followed by the supreme court of the United States in *National Bank v. Merchants Bank*, 91 U. S. 92. A question was involved as to the duty of the bank to ascertain the identity between the Milwaukee and Toronto firms of Clarkson, Hunter & Co. The court held that there was no such obligation on the part of the collecting bank. It was said:

“Here the wheat got into the possession of the consignees with the privity of the plaintiffs, and not because of the delivery to them of the bill of lading by the defendants, which is complained of. By accepting the bill drawn upon them they entitled themselves to the bill of lading which accompanied it, and which, without special instructions to the contrary, the defendants were left to assume had been sent to them *for no other purpose than to enable the consignees to see that they were to be vested with full control over the property if they accepted the bill.*

“If anything else had been intended the plaintiffs would hardly have selected a bank as their agent, for they could not expect of them

that they would undertake that kind of agency which would require them either to take the 10,000 bushels of wheat into their possession, and retain it during the forty-five days, or that they should keep a constant watch upon the conduct and circumstances of the assignees, in order that they might step in with the bill of lading (if they retained it), and exercise the rights of the consignors as soon as they suspected insolvency" (p. 293).

It may here be said parenthetically that if any such burden as was imposed upon the Port Arthur branch by the court's instructions was intended by the Seattle bank, it would hardly have selected a bank as its agent, because it would have compelled the Port Arthur branch to advance the freight on the cargo, amounting to several thousands of dollars, store and insure it at its expense, and then stand guard over it as long as it remained in Port Arthur and was not paid for.

In *Dickerson v. Wason*, 47 N. Y. 439, the court said:

"The property in business paper received for collection by one engaged in the business of banking and collection, and forwarded by him to his correspondent in the usual course of such business, without any express agreement in reference thereto, does not become vested in the correspondent, although he may have remitted upon general account, in anticipation of collections."

It was further held in this case that if the property in the note is to vest in the correspondent for

collection he or it *must become absolutely responsible* to the principal for the amount, and that the obligation to become thus responsible can be established only by a contract to be expressly proven or inferred from an unequivocal course of dealing.

In the present case if the Port Arthur branch became the owner of these documents, as the jury were instructed it must have been by virtue of some special contract, and none such has been shown; if the Port Arthur branch became the owner of these documents and the goods represented by the bills of lading, then there must have been an obligation on the part of the Port Arthur branch to pay the Seattle bank the purchase price of the flour. In other words, this transaction must be shifted from one of agency to one of purchase and sale. The instructions of the trial court imposed upon the Port Arthur branch the same obligations concerning the care of this flour as if the Port Arthur branch had agreed to buy it from the Seattle bank.

Generally, that a collecting bank does not acquire title to documents or the property represented thereby which are sent to it for collection, see,

*Tyson v. Western National Bank*, 26 Atl. Rep. 520;

*Midland National Bank v. Brightwell*, 49 S. W. Rep. 994;

*Commercial National Bank v. Armstrong*, 39 Fed. 684.



A collecting bank cannot sell the goods represented by a bill of lading to a third party without notice to the sender.

*Gregg v. Bank of Columbia*, 52 S. E. Rep. 195, in which the court said:

“The Chicago owner of the corn had to the drafts and bills of lading invested the Bank of Columbia with legal authority to offer the corn to Miot, whether as purchaser or as agent of the plaintiff is not material. But when he refused to take it, the authority of the bank was at an end, and it had no more right to sell the corn to another than if it had never had the drafts.”

In discharge of its duties as agent the Port Arthur branch was bound only to exercise reasonable care and diligence.

*National Bank v. Merchants Bank*, 91 U. S. 92, in which the court said:

“In the case in hand, the Bank of Commerce, having accepted the agency to collect, was bound only to reasonable care and diligence in the discharge of its assumed duties. *Warren v. Suffolk Bank*, 10 Cushing, 582. In a case of doubt, its best judgment was all the principal had a right to require. If the absence of specific instructions left it uncertain what was to be done, further than to procure acceptance of the drafts and to receive payment when they fell due, it was the fault of the principal. If the consequence was a loss, it would be most unjust to cast the loss on the agent.”

*Bank of Bay &c. v. Monongahela National Bank*, 126 Fed. Rep. 436.

The foregoing authorities, and many others which are therein cited, hold without dissent that the true theory of the relationship between the Seattle and Port Arthur branch was that of principal and agent, and in no sense that of vendor and vendee. Therefore the instruction of the trial court to the effect that (p. 227):

“The legal title to the draft and to the documents and to the flour in question passed to and became vested in the Russo-Chinese Bank, and it was in the power of the plaintiff to handle, contract, sell and dispose of such flour in any way that was deemed expedient by the plaintiff,”

would seem erroneous; for if the title to the draft and bill of lading was not vested in the Port Arthur branch *a fortiori*, the title to the flour could not have been vested in that bank.

This leads to the second suggestion, which was not considered by the trial court in the instructions given and which appears upon its face at least to at once show the erroneous character of the instructions. This is the fact that there accompanied the draft bills of lading, an insurance policy, and an invoice or bill of sale (p. 29) which recited that the Centennial Mill Company had sold to Clarkson & Co. the flour in question at \$4.10 per sack. The terms stated were: “Draft 90 days thro Russo-Chinese Bank”. When the Port Arthur branch received this document, which as noted was sent it as a part of the transaction, and when furthermore the

letter from Seattle transmitting the draft read (p. 44):

“Seattle, Wash., Dec. 11, 1903.  
The Manager Russo-Chinese Bank, Port Ar-  
thur, China.

Dear Sir: Enclosed I hand you *for collection* and returns in New York funds 90 d/s drafts as follows:

Clarkson & Co. G. \$ 1,100.00

“ “ “ G. \$36,194.80

Documents are to be delivered on payment.

Very truly yours,

R. R. SPENCER.”

(Italics ours.)

it is shown that the sole function of the Port Arthur branch was to handle these documents for collection; that they could not sell this flour to anyone other than Clarkson & Co., and that they never had any title, nor was it intended by the Seattle bank that they should have any title to the *flour*. As a part of this express agency for collection, they were, it is true, vested with the ostensible ownership of the flour by virtue of the possession of the bills of lading, but this was as an agent merely, and not as an owner.

The Port Arthur branch had nothing to do with the selection of the common carrier which transmitted the flour to Port Arthur, and its agents assert that they did not know that Clarkson & Co. were the agents of the steamship line until after the flour had been received in Port Arthur, and then, on account of investigations which they made at the

request of Mr. Ostrander. But it is immaterial whether they knew that fact or not. It appears that there was no reason to suppose that Clarkson & Co. were not solvent at the time, and not a reliable house. Clarkson & Co. had for some years been buying flour in large quantities from the Centennial Mill Company and through these banks (p. 135). Mr. Ostrander, the general agent of the Centennial Mill Company testified (p. 135) that he was at Port Arthur late in January and early in February, 1904; that he knew Clarkson & Co. well and knew that they were agents of the steamboat company, and that such was a well-known fact. We ask under what possible theory is it claimed that the Russian bank should in this especial case have been called upon to take all these precautions when it had never done so in the past?

If there could have been any element of suspicion from the fact that Clarkson was also the agent of the steamship company, the Seattle bank cannot complain that they were not notified thereof by the Port Arthur branch, because the Centennial Mill Company at least knew that fact, and did not deem it a circumstance sufficient to comment upon.

The instructions of the trial court placed upon the Port Arthur branch a responsibility which we assert is entirely foreign and beyond that of a bank handling documents for collection. It would render such banking business impossible, because it would thrust upon a collecting bank heavy responsibilities

and oblige it to make outlays as to a cargo which might be worthless. In the present case it is apparently claimed that the Port Arthur branch, without any specific request from the Seattle bank and merely by force of their employment, should have at once taken the following steps:

1. To pay the freight of \$5.00 per ton, or \$4,325.72 (p. 31), because the bill of lading stated that the freight, "with all other charges, advanced " charges and average, should be paid immediately " upon the discharge at Port Arthur".

2. To secure other warehouse accommodations (if there were any in Port Arthur) and pay the cost of moving the flour from the warehouse of Clarkson & Co. to this other warehouse.

3. To pay the cost of insurance.

4. Apparently also to place watch over and guard the flour.

This responsibility, however, becomes still more extraordinary when the conditions under which the documents were transmitted are considered, for, as noted, these banks had had similar transactions for some time. Mr. Spencer testified (p. 122) that the letter his bank received from the Port Arthur branch dated January 22, 1904, and acknowledging the receipt of the draft was the usual form in which he had received such acknowledgments. This letter contained the following statement (p. 123):

“PLEASE NOTE.

1. That, unless otherwise instructed, bills of any description sent us for procuring acceptances &/or for collection will be protested both for non-acceptance or non-payment and immediately returned to the sender.

2. When sending us for collection DOCUMENTARY BILLS OR ONLY DOCUMENTS, clearly state in your letter accompanying same whether in case of dishonor:—

(a) both bill and documents are to be promptly returned with the relative deed of protest, or

(b) if the bills is to be returned and the relative documents are to be kept here at your disposal, or

(c) if the goods are to be stored by us and fire insurance is to be covered pending receipt of your instructions.

3. Our bank does not guarantee that the goods be stored in due time when there is no storage accommodation obtainable, and takes no responsibility whatever if same are not landed in perfect condition, nor if the goods are deteriorating or becoming of lower value in consequence of price fluctuations while under our bank's control.

Yours faithfully,

RUSSO-CHINESE BANK  
(Port Arthur Branch).”

It is admitted by Mr. Spencer that he did not give any instructions to insure or store the flour (p. 124). By the instructions of the court the Port Arthur branch was held under its common law liability to



do these acts concerning which it had asked express instructions and which the Seattle bank did not take the precaution to give. It was furthermore asked to exercise a greater care over the flour than Mr. Ostrander thought was necessary. We have therefore the unique result, that there is visited upon a collecting bank a greater degree of care and a heavier responsibility than the shipper of the flour or the bank from whom the draft was received thought was necessary.

There is still a third consideration in no wise referred to in the foregoing instructions, and which tends to prove that the Port Arthur branch was not the unqualified owner of the flour, in accordance with the court's instructions. This arises from the fact that the *draft had been accepted by Clarkson & Company*. This essential step in the transaction has been ignored, and the relations of the parties defined as if the draft had *not* been accepted. When the draft was accepted by Clarkson & Co. they became the principal debtor thereof and the document was to all intents and purposes a promissory note, by which Clarkson agreed absolutely to pay the sum mentioned, ninety days from date. As soon as this acceptance was obtained the Port Arthur branch could not dispose of this flour to anyone other than Clarkson & Co., for the reason that they retained title simply *as security for the payment of the draft*. If there was no obligation

on the part of the Port Arthur branch to transfer the bills of lading to Clarkson & Co., then there was no consideration for the payment of the draft; per contra, if there was such consideration for the draft, then there must have been a corresponding obligation on the part of the Port Arthur branch.

We refer in this connection to the leading case of *National Bank v. Merchants Bank*, 91 U. S. 92. In this case the bills of lading were delivered upon acceptance of the draft, and it was held that the bank was obliged to deliver them upon such acceptance. The case of course differs from the present one in that there was here an express instruction to deliver against payment, but even in such a case this opinion holds that the property is retained by the bank merely *as security*. That the fact that the draft is one "for collection" indicates an agency, and rebuts the inference that the agent is the owner of the draft. Directly pertinent is the following statement by the court (p. 97):

"In the absence of special agreement, what is the consideration for acceptance of a time draft drawn against merchandise consigned? Is it the merchandise? or is it the promise of the consignor to deliver? If the latter, the consignor may be wholly irresponsible. If the bill of lading be to his order, he may, after acceptance of the draft, indorse it to a stranger, and thus wholly withdraw the goods from any possibility of their ever coming to the hands of the acceptor. Is, then, the acceptance a mere

purchase of the promise of the drawer? If so, why are the goods forwarded before the time designated for payment? They are as much, after shipment, under the control of the drawer, as they were before. Why incur the expense of storage and of insurance? And if the draft with the goods or with the bill of lading be sent to a bank for collection, as in the case before us, *can it be incumbent upon the bank to take and maintain custody of the property sent during the interval between the acceptance and the time fixed for payment? (The shipments in this case were hundreds of bales of cotton.)* Meanwhile, though it be a twelvemonth, and no matter what the fluctuations in the market value of the goods may be, are the goods to be withheld from sale or use? Is the drawee to run the risk of falling prices, with no ability to sell till the draft is due? If the consignment be of perishable articles,—such as peaches, fish, butter, eggs, &c.,—are they to remain in a warehouse until the term of credit shall expire? And who is to pay the warehouse charges? Certainly not the drawees. If they are to be paid by the vendor, or one who has succeeded to the place of the vendor by indorsement of the draft and bill of lading, he fails to obtain the price for which the goods were sold.” (*Italics ours.*)

This case contains many observations which are pertinent to the present one. It has long been cited by text writers, and other courts, as authority, and we commend it to the careful examination of the court.

We have searched the books to find a case in which it has been held that a collecting bank has any such degree of responsibility concerning the goods which are evidenced by a bill of lading that passes through its hands. No such case has been brought to our attention, nor can we find that any such claim has been made. This silence on the subject is strong evidence that it is not founded upon any legal right. As was said in *Le Caux v. Eden*, 2 Doug. 594, cited in *Bancroft v. Bancroft*, 110 Cal. 374, concerning another question:

“There is no case in which it has ever been holden that such an action would lie; and if it could be maintained, there are, in every way, such frequent opportunities for it that it must have happened in every day’s practice, or some instances at least must have been in the memory of those who have had long experience in ‘Westminster Hall’; but there is not the smallest trace of such a determination, or even dictum, in any court in England. A universal silence in Westminster Hall on a subject which so frequently gives occasion for litigation is a strong argument to prove that no such action can be sustained. That case was decided in 1781, and dealt with litigation which could arise only out of the exceptional condition of war. How much stronger, therefore, is the authority of more than another hundred years of ‘silence’ in the courts of both England and America, upon a subject which, both in peace and war, ‘so frequently gives occasion for litigation’.” (pp. 378-379.)

## II.

**THE COURT ERRED IN PERMITTING EVIDENCE OF A SO-CALLED  
CUSTOM CONCERNING THE DUTIES OF A COLLECTING  
BANK.**

The witness Spencer upon cross-examination by defendant (page 125 et seq.) was asked many questions concerning the commercial usage among banks. Objections were made to these questions, which were overruled. The witness stated in answer (p. 128) that the collecting bank was expected to use diligence in taking such steps in regard to storage, insurance and so forth as they would take were the property their own. The theory upon which this evidence was permitted was stated by the witness himself as follows (p. 128):

“As I take it then, Mr. Spencer, these requirements or these suggestions (those contained in the letter referred to) that the Russo-Chinese Bank made to you as to what you should tell them when you sent the draft, what to do with it in case of dishonor, as I understand you the commercial usage would control that regardless of whether you told them to do so or not?

“A. Yes, sir.”

That is, it was claimed by the witness, and the court allowed the testimony, to the effect that the custom would control *even if the Seattle bank had directed the Port Arthur bank specifically in regard*

to the subject. The custom would thus override any specific agreement made between the parties.

We submit that this evidence is inadmissible upon several grounds: It was in the first place not cross-examination, and this objection was made (p. 131); because the witness, upon his direct examination had been asked (pp. 122-125) only concerning the facts of this specific case.

In the second place, usage or custom it is submitted cannot be invoked in contradiction of an express contract.

“While a custom may be resorted to to explain a doubtful or ambiguous contract, it will not be admitted to vary or contradict the terms of an express contract. No usage can change the plain meaning of a contract.”

*Smith v. National Bank of D. O. Mills*, 191  
Fed. 226;

*Morse on Banking*, Sec. 223.

“A custom or usage regulating dealings between certain merchants and their customers, contrary to or different from the law of the land, cannot be allowed \* \* \* a bill of lading having a definite legal meaning, the liability of the carrier fixed by law cannot be changed by the custom of a particular place among a particular class of shippers. \* \* \* Usage cannot make a contract where there is none, nor prevent the effect of the settled rule of law.”

*Charles v. Carter*, 36 S. W. Rep. 396.



The evidence concerning this alleged custom would have made a new contract for the parties. It would have compelled the Russo-Chinese Bank to store the goods in an independent warehouse, which in itself would have been a proceeding that we assert the bank in the absence of instructions had no right whatever to do. If it had so acted it is our claim that it would have interfered without right in the relations between the Seattle bank and Clarkson & Co. It would have compelled the Port Arthur branch to have incurred a large liability for freight, cartage, warehousing, etc., and to have charged this liability against the goods. This in effect is an entirely new contract, because the Seattle bank may not have been willing that this expense should be incurred.

In the third place, this evidence was not admissible because the witness did not testify concerning the custom at Port Arthur, a place that he had never visited (p. 133). The witness was not asked, nor did he answer, concerning his knowledge of any commercial custom in Port Arthur, but said simply "that it is commercial usage". A usage or custom, to be of any effect, must be shown to have prevailed at the place to which the goods were sent, and not from which they came. As was said in *Wisconsin &c. Bank v. Bank of British North America*, 21 Upper Canada, Queen's Bench Reports:

“Evidence of commercial usage is alone material which deals with the usage at the place where the duty is to be discharged.”

In this case evidence of the commercial usage at Milwaukee, from which the documents were sent, was held inadmissible to control the actions of the parties in Toronto, where the documents were received.

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### III.

**THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY THAT THE DRAFT ON CLARKSON & CO. HAD NOT BEEN PAID. HEREIN IS DISCUSSED THE SPECIAL VERDICT OF THE JURY.**

The plaintiff requested the court to instruct the jury as follows (p. 216):

“In relation to the affirmative questions set up by the defendant, I advise you that they are as follows:

“1. That the draft in question was placed by Clarkson & Co. with the plaintiff. In this connection I charge you that there is no evidence on the part of the defendant that this draft was so paid, either in whole or in part, and therefore this first affirmative defense of the defendant must be disregarded by you.”

And also (p. 213), that the evidence shows without contradiction that such draft had not been paid.

The evidence on the question of the payment of the draft is as follows:

1. Plaintiff showed that the draft had been protested for non-payment and was, on May 26, 1904, remailed to the defendant with the notice of protest. The possession of this draft by the payee is presumptive evidence that it had not been paid.

2. The witness Friedberg testified (p. 20) that the draft had not been paid or any part of it; that it was protested (p. 42) on May 3, 1904, and returned with the deed of protest to the defendant on May 26, 1904.

3. The witness Drozdov, a clerk of plaintiff's Port Arthur branch, testified (p. 48) that the draft was not paid by Clarkson & Co., either in whole or in part, and he produced the letter (p. 50) from the Port Arthur branch to the notary public requesting him to protest this bill, and also the letter of May 26, 1904, from the Port Arthur branch to the defendant, in which it was stated (p. 51) "This had  
" to be protested for non-payment and is herewith  
" returned together with the deed of protest." This witness also testified (p. 54) that he kept all the books of the Russo-Chinese Bank from January 1, 1904, to December 23, 1904.

4. The witness Richter testified (p. 120) that he resided at Port Arthur from January 1, 1904, to the end of that year, and that he kept the register of accepted checks issued by the Port Arthur branch. He testified: "I know for a fact that such draft has

“ not been paid by Clarkson; that it was protested  
 “ and the bill and protest sent to the National Bank  
 “ of Seattle, but has gone astray in consequence of  
 “ the war.”

5. The books of the Russo-Chinese Bank which were said by Friedberg (p. 20) to have been kept correctly and to state all the transactions concerned with the collection of the draft forwarded for collection, were introduced in evidence. They show the receipt of the draft, its date of maturity and its collateral; but under the head of “payment” no annotation is made, but the following appears: “Draft returned 13-V-04,” or, under the Gregorian calendar, May 26, 1904.

Special significance ought to be attached to these book entries, because they were made at a time long prior to the present dispute having been suggested, and the books were for the greater period in the possession of the Japanese.

6. The witness Clarkson, who was more interested than any one else in showing that the draft had been paid because he was its acceptor, and who appeared as an unwilling witness because he testified that he had had a controversy with the Russo-Chinese Bank, said (p. 115): “I am unable up to  
 “ the present time to say whether I was mistaken  
 “ in my statement that the draft had been paid or  
 “ not.”

As against this showing on the part of the plaintiff there is no evidence whatever that the draft was paid.

Defendant called only two witnesses, Davidson and Short, neither of whom were in Port Arthur at the date of the maturity of the draft.

Davidson testified (p. 194): "I have no definite knowledge that it ever was paid, since I left Port Arthur long before it fell due."

Short testified (p. 154) that he did not have any personal knowledge concerning payment of this draft; that he was not in the employ of Clarkson & Co. at that time.

The foregoing is all the testimony in the record as to the payment of this draft. We submit that it shows convincingly and without conflict that it was not paid and therefore plaintiff was entitled to an instruction to that effect. This instruction was not given by the court, but the court did submit to the jury the following special issues, and the jury found (p. 18):

"We the jury in the above entitled cause find that the Port Arthur branch of the Russo-Chinese Bank did receive payment for the draft dated December 11, 1903, on account of which the plaintiff made the remittance to the defendant alleged in the complaint."

As noted, this special verdict has no support whatever in the testimony, and the plaintiff now claims that it was error on the part of the trial court to refuse the instruction requested.

The instruction requested and also the special issue use the term "payment". This must be un-

derstood in its legal definition as *satisfaction in money*. If the word "payment" was used in any other sense, such special definition should have been given with the issue submitted to the jury.

But even if it be claimed that the word "payment" would include a set-off against the plaintiff created by reason of its negligence in permitting Clarkson & Co. to sell the flour, still the instruction should have been given and the special verdict is also unsupported by any evidence. We shall hereafter speak of the testimony of Short to the effect that he was verbally given permission by the manager of the bank to sell this flour. Assuming that such consent was given and was unauthorized and illegal, there is nevertheless no evidence that Clarkson & Co. did in fact sell the flour, or that anything was ever done under this permission. The only testimony on this subject is that of the witness Short, who said upon cross-examination (p. 159):

"Q. Now, of your own knowledge, Mr. Short, can you positively state that you know whether any of this flour from the Hyades was sold while you were there?

"A. From the Hyades?

"Q. Yes.

"A. I can; no, I can't.

"Q. You cannot?

"A. I cannot state positively the Hyades."

And again, at page 160:

"Q. Do you know whatever became of the Hyades flour?

"A. The Hyades flour?

"Q. Yes.



"A. I don't.

"Q. Do you know whatever became of a single sack of it?

"A. No. Nothing other than what I have heard them testify to.

"Q. Yes, but of your own knowledge, I mean?

"A. No.

"Q. You don't know anything about that at all?

"A. I know that was in the warehouse of Clarkson & Co.

"Q. Whether or not it was ever delivered out of the warehouse to anybody, you cannot say.

"A. I cannot say.

"Q. Whether or not the bank ever got any money for the draft, you cannot say?

"A. No, I cannot say."

If therefore we give full credence to the testimony of this witness, that, although he knew that the bills of lading were in the bank and that they were held by the bank against payment of the draft and could not legally be delivered by the bank until the draft was paid, and although he furthermore knew that Clarkson & Co. as agent of the steamship had no right to deliver the flour except upon surrender of the bills of lading, and although he testified furthermore, that any such delivery would have been a criminal act on his part, still, without request for the bills of lading, an oral authorization was given him by the bank, assuming, we say, that this peculiar arrangement is believed, nevertheless it quite fails to be of any significance, for the reason that there is no testimony that this illegal transaction

was ever carried out, or that a single sack of the flour was ever sold or released by Clarkson & Co. under this arrangement.

We therefore reiterate that plaintiff was entitled to the instruction requested and that there is not the slightest evidence to support the special verdict of the jury, regardless of any special definition given the word "payment".

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#### IV.

##### **THERE IS NO EVIDENCE OF ANY NEGLIGENCE ON THE PART OF THE PORT ARTHUR BRANCH.**

It has been shown that, so far at least as concerned the documents consigned to its care, the Port Arthur branch fulfilled its engagements to the letter and with the most scrupulous fidelity. It is our claim that this was the limit of the obligations imposed upon the plaintiff; that it was acting as a bank and not as a commission house, and that its province primarily and solely, in the absence of special instructions, was concerned with the documents entrusted to its care. Its duties in that regard were:

1. To acknowledge receipt of the documents. This was done the day they reached Port Arthur.

2. To present the drafts for acceptance to Clarkson & Co. This was done on the next day after the draft was received.

3. The bank also notified Seattle on January 30, 1904, that the draft was accepted on that day. This, however, was not a necessary part of its engagement.

4. To present the draft for payment upon its maturity. This was done.

5. To protest the draft if it was not paid. This was done. It should be noted in this connection, however, that this protest was not necessary for the reason that the office of a protest is only to hold parties upon the paper who are not primarily liable. It is not necessary in case of an acceptor. The only parties to these documents were the Centennial Mill Company, Clarkson & Co. and the Seattle National Bank. There was no necessity of protest, so far as concerned Clarkson, because he was the acceptor and its primary debtor. A failure to protest did not work the Seattle bank any harm, because the Centennial Mill Company has repaid the Seattle bank, which is all it could have done in any event. Therefore, even if this draft had not been protested, it was *damnum absque injuria*. Nevertheless it was protested.

6. To notify the Seattle bank and return the protested draft. This was done as soon as possible—on May 26, 1904.

7. To hold the bill of lading until the draft was paid. This the Port Arthur branch did, and the bill of lading has never been delivered by it to this day.

These, it is submitted, were, in the absence of any special instructions from the Seattle bank, all the steps which the Port Arthur branch was obliged to take.

It will be admitted at once that the Port Arthur branch did not have the right to deliver these bills of lading or permit the steamship company to discharge the flour without the surrender of the bills of lading. Such a step would have been in direct violation of the letter of instructions sent by the Seattle bank. In this connection it becomes necessary to examine somewhat narrowly the procedure which it is claimed by the witness Short he was authorized by the bank to take. If we are correct in assuming that the instructions of the court and also its rulings in the admission of evidence were any of them erroneous, this discussion becomes immaterial, because it must be assumed that the jury returned their verdict based upon the law as stated to them; that they found that the draft had been paid with such view of the law. If this view is erroneous, the verdict must fall. But in event of a new trial the effect of this transaction between Short and the bank may become important, and it is for this reason that we now refer to it. Short's testimony is that he accepted the draft on January 30 (p. 141); that the documents were then in possession of the bank and were attached to the draft (p. 147); that he knew that the documents were to be delivered on payment of the draft (p. 147); that at that time he gave a document to the bank signed, as he states

(p. 155), by himself. This document was not produced by either party, but the witness stated that it read something to the effect "that the cargo was "delivered to Clarkson & Co. on the guaranty that "the cargo was the property of the bank, and that "as it was sold and paid for the money was to be "turned in to the Russo-Chinese Bank".

He testified further, that his was the only signature on the document (p. 155); that the bank did not sign it and did not give him any writing at all.

We submit that this testimony is of such a vague character as to make it impossible of understanding. If the bank had given Short permission to sell this flour, a document would have been signed by the bank *and delivered to Clarkson & Company*. The mere fact that Short gave a letter of the character to which he testified to the bank could not have been any evidence of negligence on the bank's part. The witness, however, said (p. 156) that he had a sort of oral talk with the manager. He could not state on what date this took place (p. 165), and further testified:

"Q. Did he (Ofranskin) write nothing at all.

"A. No, nothing was written at all.

"Q. He would simply wink his eye or say 'All right' or something to that effect.

"A. I didn't pay particular attention to that winking of his eye.

"Q. But you did know that he said something?

"A. Yes.

"Q. And that was?

"A. It was all right and we took the cargo."

It will be noted that this witness does not directly say that the manager of the bank ever told him that he could sell the flour. He is very guarded in what he claims emanated from the bank on this subject. He possibly leaves that to be inferred from the fact that the manager, as he states, accepted the letter of guaranty; but the essential fact of a direct authorization by the bank to sell the cargo is not shown. But we shall claim in this connection, if it becomes necessary, that, under the circumstances, any such permission of the manager of the bank was void, and, to the knowledge of Short, beyond the scope of the manager's authority; for, as we have already noted, Short has testified directly that he knew that the bills of lading were held by the bank as against payment of the draft; that the bills of lading expressly state that the cargo could only be delivered by the steamship company upon surrender of the bills of lading. Clarkson & Co. were the agents of the steamship company that executed these bills of lading and it must have been in its capacity as such agent and not as Clarkson & Co. importers, that Short visited the bank. With this knowledge on the part of Short, any statement by the bank's manager that he could deliver the flour without the bills of lading was manifestly void. Mr. Short knew, as he testified, that the bank was holding these documents for collection and could deliver the bills of lading only as against payment. He was therefore dealing with an agent whose powers were defined and limited, and those limita-



tions were known to him as well as they were to the bank.

We need here only invoke the familiar rule, that an agent can only bind his principal within the scope of his authority. No question of ostensible agency is involved because the actual authorization was known to Short. Short therefore had no right to act under this authority, if it were given, and he must, in law, be deemed to have known that any such permission was not only contrary to, but directly opposed to the express authorization under which the bank was acting. If, therefore, he saw fit to act under this oral permission, he was acting under an admittedly illegal permission upon which he had no right to rely.

If Clarkson & Co. therefore did turn over the custody of this flour from themselves as agent of the steamship company to themselves as importers, and thereafter sell it, they were committing an illegal act, which they knew at the time to be illegal and from the consequences of which they can not defend themselves by hiding behind an alleged permission of the bank which was known to be illegal. They did it on their own responsibility and this alleged "permission" was an idle thing.

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## V.

### ERRORS IN ADMISSION AND EXCLUSION OF TESTIMONY.

1. We have already discussed the rulings of the trial court as concerns the questions asked the wit-

ness Spencer about the customs and commercial usage among bankers. These rulings are assigned as error (pp. 243-248). It is our contention that this evidence was not properly admissible, because in contravention of well settled rules of law; that it permitted evidence of a custom to override the agreement between the parties as shown by their correspondence, and that it was in any event inadmissible because it did not refer to the place, viz.: Port Arthur, in which the engagement of the Russo-Chinese Bank was to be performed.

2. Certain questions were asked the witness W. S. Davidson concerning the customs and methods of bankers in the Orient. These questions will be found on pages 177 to 188 and are assigned as error (pp. 248-252). The first question (p. 177) was:

“What is the custom of bankers with reference to presenting drafts for acceptance?”

To which an objection was made on the ground that there was here no reason to invoke any custom or usage. This objection being overruled, the witness answered that it was customary to request the drawee to accept it.

The next question was (p. 178):

“What is the established custom among bankers at Oriental ports with reference to the handling of drafts with bills of lading and documents attached, when the drafts are in their hands for collection?”

To this question the previous objection was made, namely, that there was no reason to invoke a custom

or usage, and secondly, because the conditions are not stated in the question, that is, it was not stated whether the documents referred to were sent as against payment or as against acceptance. This objection being overruled the witness answered:

“The established custom among bankers in the Orient is not to part with the documents until the drafts have been paid, if the documents are only deliverable against payment. It often happens, however, that the firm upon which the draft is drawn has a good credit with the bank and under those circumstances the bank delivers the documents against acceptance and thereby accepts responsibility.” (p. 178.)

The next question was (p. 179):

“What is the custom of the Russo-Chinese Bank upon the arrival of shipments were drafts with bills of lading are attached are in their hands for collection?”

(The word “were” is evidently a misprint for “where”.)

To this question again the objection was made as heretofore, and we request this court to read the precise language of this objection and the remarks of the trial court thereon (pp. 179-180). The objection being overruled the witness answered:

“The custom of the Russo-Chinese Bank at Port Arthur was to see that the cargo was stored and insured and the managers of the Russo-Chinese Bank have frequently come to the office of Clarkson & Company to ascertain if certain cargo was properly stored and have taken out fire insurance with some of the fire

insurance companies for which Clarkson & Company acted as agents, on such cargo." (p. 180.)

The plaintiff then requested that portion of the answer which began with the words "and the managers", etc., down to the end of the sentence, be struck out as not responsive and as being no evidence of a custom, and this motion to strike out was denied. This ruling also was excepted to.

It is submitted that these objections should have been sustained. Manifestly the jury could not know whether the custom referred to was pertinent, unless it was stated to be under like circumstances to those given in the pending case. Whether or not the Russo-Chinese Bank looked after the storing and insurance of the cargo would of course depend upon their special instructions. The witness did not claim to know whether any such instructions were given. Until the facts connected therewith were made clear, it is manifest that no evidence of any custom could be pertinent, because it cannot be denied that if the Seattle bank had specifically requested the Russo-Chinese Bank to store and insure the cargo and this commission had been accepted, then that such duty devolved upon the Port Arthur branch.

(We direct the court's attention to the fact that there is a mistake in the printed record of the assignments of error. The answer to the question printed in subdivision V was not the one given, but is as set forth on page 178, and the answer which

is inserted in the specification of error was in answer to the question on page 179.)

The witness having been allowed to state that the custom of the Russo-Chinese Bank was to store and insure the cargo, he was asked the question (p. 180) if in transactions between Clarkson & Co. and the Port Arthur branch this custom was strictly observed. To this last question an objection was made upon the ground that the custom as between the two firms was not pleaded, and further, that the course of business referred to in the question must be diametrically opposed to the previous answer of the witness, when he stated what the custom between the firms had been.

It can require no citation of authority to show that a party that relies upon a custom or usage must plead it. The only pleading on that subject in the amended answer is that set out on page 13, to the effect that it was the duty of the plaintiff under the custom of bankers to look after, protect and care for the flour represented by the bill of lading, and to warehouse and insure the same. The question which we are now discussing did not refer to this custom so pleaded, but to a course of business *which was opposed to this custom*. There is no pleading to the effect that the custom or course of business between the firms permitted Clarkson & Co. to have the bills of lading before the draft was paid. Indeed, this testimony seems a good instance of the danger of testimony of this character, which is after all but opinion testimony, for this

witness having stated what the custom was between the two banks, *then proceeds to state that this custom was not observed*. Then it ceased to be the custom.

3. We have also assigned as error (p. 252) the overruling of the objections of plaintiff to all the questions asked the witness Davidson concerning the custom and practice and course of dealing between the Russo-Chinese Bank and Clarkson & Co. We submit without a more clear statement of the character of the instructions given by the forwarding bank in each case it was impossible to invoke any custom or usage.

4. We urge also that the court committed error in denying plaintiff's motion to strike out a portion of the answer of the witness Davidson to Direct Interrogatory 33 (p. 185), the latter portion of the question being:

"State whether or not the Russo-Chinese Bank consented to the sale of the flour on the Hyades by Clarkson & Company prior to the payment of drafts?"

The witness answered (p. 186):

"On or about the 15th of February, 1904, the Russo-Chinese Bank did consent to the sale of the flour ex steamship 'Hyades,' if that is the name of the steamer that arrived at Port Arthur on or about the 8th of February, 1904."

Plaintiff's motion was based upon the fact that it had already been stipulated in the case that the



vessel which reached Port Arthur on or about February 8, 1904, was not the Hyades, but the Pleiades. This stipulation appears on page 122, to the effect that the Hyades reached Port Arthur on January 16th and left on January 22nd; that the Pleiades reached Port Arthur on February 7th and left Port Arthur on February 13th.

Obviously therefore the testimony of the witness to the effect that the Russo-Chinese Bank did consent to the sale of the flour had no reference to the cargo in question, because he was speaking about the *Pleiades* and *not* the Hyades. It is furthermore evident that all of the answers of this witness concerning the action of the Port Arthur branch in releasing flour referred to the cargo of the Pleiades, which he personally sold to Ginsburg & Co. (pp. 186-187). The evidence was demonstrably irrelevant as not referring to the cargo securing the draft.

5. We urge also that the court erred in refusing to strike out a portion of the answer of this witness Davidson to Direct Interrogatory 56. The question was:

“Do you know whether this draft drawn by the Centennial Mill Company and in the hands of the branch of the Russo-Chinese Bank at Port Arthur covering this shipment of flour was ever actually paid?”

To which the witness answered:

“No; I have no knowledge, definite knowledge, that it ever was paid since I left Port

Arthur long before it fell due. But if it was not paid by Ginsburg & Company then it was the fault of the Russo-Chinese Bank because the firm of Ginsburg & Company to my definite knowledge have ever since been able to pay this draft and if for any reason the arrangement I made with Ginsburg & Company was avoided or not carried out then the Russo-Chinese Bank had it within their right and power to demand the surrender of the keys to the warehouse from Ginsburg & Company."

The portion of this answer beginning with the words "But if it was not paid" is obviously not responsive to the question and was most detrimental to the plaintiff, because the witness pretended to be then speaking about the draft in question, stating that Ginsburg & Co. have ever since been able to pay it. The motion to strike out was precise on this point (pp. 194-195). The facts are that Ginsburg & Company had nothing to do whatever with this draft, but were concerned with another cargo, and when the witness stated that he had no definite knowledge that this particular draft had been paid the rest of his answer should have been eliminated.

6. We urge that the court erred in overruling the objection to the question asked the witness Short (p. 143), as follows:

"Now, in all your dealing with the Russo-Chinese Bank in handling other shipments of the Centennial Mill Company, I will ask you what arrangement if any was made with the bank in regard to the handling of this flour?"

This witness was the only witness produced by the defendant who claimed to have had any part in the special transaction with which the court is concerned. He testifies that he was the one who accepted the draft for Clarkson & Co. and made the arrangement with the Russo-Chinese Bank. We submit that it is quite immaterial as to what his dealings had been with the bank in reference to other shipments.

7. We urge that the court erred in refusing to strike out as not responsive a portion of the answer of the witness Short (p. 146) to the following question:

“Who told them?”

“A. I would tell them or Davidson would tell them. The object of getting a 90 days sight draft was that we could get delivery of the flour without payment, and that we paid in the money as soon as we got it. As soon as the flour was sold the money was collected in.”

The answer, beginning with the words “The object” to its conclusion can have no reference to the question “Who told them?” The objectionable matter was highly detrimental to plaintiff. The motion was upon the ground that it was not responsive to the question—and should have been granted.

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## VI.

### THE COURT ERRED IN REFUSING CERTAIN OTHER INSTRUCTIONS REQUESTED BY PLAINTIFF.

These instructions are intimately concerned with the foregoing argument. They are:

1. Requested instruction IX, p. 217, to the effect that no custom or usage could impose upon the plaintiff obligations in addition to those contained in its letter of instructions.

2. Requested instruction X, pp. 217-218, to the effect that even if the Russo-Chinese Bank was negligent, the Seattle bank was entitled to recover only the actual damages suffered by reason of such negligence. This instruction is pertinent with reference to the alleged permission given Short by the manager of the bank. We may assume for argument's sake that this permission was given, but nevertheless as there is no showing that any action was ever taken under the permission and no flour ever disposed of under it, then assuredly the negligence is without damage.

3. By requested instruction XI, p. 218, there was attempted to be brought before the jury the law concerning the payment to the Port Arthur branch of the 67,000 roubles obtained from Ginsburg & Company. The evidence shows that this payment was made to the bank for the specific purpose in part of taking up two drafts also drawn by the Centennial Mill Company, and the proceeds of which were remitted to the defendant in Seattle. It was, however, claimed by the defendant in this case that the bank should have devoted this 67,000 roubles to the payment of the draft in question. This requested instruction was to the effect that the bank in accepting the 67,000 roubles was controlled by the instructions given it by Clarkson & Co., who

made the payment, and that the bank did not have any right to apply this money to any other drafts. Further, that even if the 67,000 roubles had been applied on the draft of December 10, it would not have been sufficient to pay it in full, and the bank would have had no right to deliver the bills of lading until such payment in full.

The court did not give any instruction concerning this Ginsburg transaction, which should have been eliminated entirely from the case, because, as many times repeated, it was concerned with another cargo than the Hyades; but since the evidence was admitted the instruction requested should have been given.

4. We assign also as error the refusal of the court to give requested instruction XII, page 218, to the effect that there was no necessity on the part of the Port Arthur branch to notify the defendant that Clarkson & Co. were the agents of the steamship company, if the Centennial Mill Company or its representatives already knew that fact.

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## VI.

**THE SEATTLE BANK HAS NOT BEEN DAMAGED BY ANY ACTS OF NEGLIGENCE OF THE PORT ARTHUR BRANCH. HEREIN IS DISCUSSED THE EFFECT OF THE PAYMENT BY CENTENNIAL MILL COMPANY TO THE SEATTLE BANK.**

Spencer, manager of the defendant bank, testifies (p. 124) that his bank had a guaranty from the Centennial Mill Company to protect them against

the draft and that, independent of this guaranty, he had a verbal understanding with the president of the Centennial Mill Company that if they continued to send drafts to the Russo-Chinese Bank it must be done at the request of the Centennial Mill Company and that this company must stand for all liabilities and risks that were incurred by so doing. This arrangement was made before the shipment on the Hyades. The witness further testified as follows (p. 124):

“The Mill Company subsequently paid the money back to us, November 2, 1904. That was before the Russo-Chinese Bank had paid us.”

It therefore appears that at the time this action was brought the defendant bank had suffered no loss from the transaction, nor has it suffered any such loss since. Plaintiff's negligence, even if assumed, has resulted in no damage to defendant. Under no circumstances can the Centennial Mill Company recover the money paid by it to the Seattle bank, because the Mill Company had itself assumed all risk and if the defendant is obliged to pay a judgment in this case it can recover it back from the Mill Company. The latter company is therefore the real party in interest.

It follows that the defendant has no valid claim for damages against the plaintiff, and having no such claim, it cannot interpose it to defeat plaintiff's claim. It is immaterial in the present case that the Mill Company may have such a claim for damages. Such claim if valid may still be enforced



by the Mill Company against the plaintiff, and to permit this claim for damages to release the bank from the payment of the sum in suit, and also to allow the Mill Company to recover thereon from the plaintiff, would be to permit a double recovery for the same cause of action.

Before this claim for negligence can avail defendant it must have acquired it by assignment or otherwise from the Mill Company. It cannot vest both in the Mill Company and the defendant.

The situation seems the same as if the Seattle bank having, we will say, a valid claim for damages on account of negligent acts against the Port Arthur branch, had assigned this claim to some independent third party. When sued by the Port Arthur branch the defendant bank could no longer rely upon this claim for damages, because it no longer owned it. The legal owner of the claim is the only one that could have interposed this defense.

The defendant at the time the suit was commenced was not the holder of any claim for damages against the plaintiff, and it therefore cannot now assert this claim as a defense to the present action.

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## VII.

### CONCLUSION.

When stripped of all unessential facts, the record in this case is simple. It shows without contradic-

tion that the sum in question was paid by plaintiff to defendant under an express agreement by defendant to pay it back if the draft of December 10, 1904, had not in fact been paid, and defendant was in no wise injured because the Port Arthur branch had indefinitely held the bills after their maturity. These were the only conditions imposed by defendant. It is the law of this case, as decided by this court, that these facts constitute a good ground for relief upon either the theory of an express or an implied promise on the part of the defendant. If considered in the light of an express promise, then plaintiff was entitled to a directed verdict in its favor because uncontradicted and overwhelming evidence proved that the draft had never been paid in whole or in part; and equally convincingly has it been shown that the Port Arthur branch did not indefinitely held the bill after its maturity, but returned it to Seattle as soon as it was possible to do so. Therefore, under the strict letter of the contract, the plaintiff has complied with the two conditions precedent, and is entitled to its money.

But if we assume that this is an action upon an implied contract, then the plaintiff's right is equally plain, because there can be no question that the money was paid the defendant under a misapprehension of facts, and only upon the hypothesis that the draft had in fact been paid to the Port Arthur branch. That hypothesis was wrong, therefore there arose at once an implied obligation on the

part of the defendant to restore the consideration it had received.

After the evidence had been given, plaintiff requested the trial court to direct the jury to return a verdict in its favor (p. 213) and a refusal so to do has been assigned as error. We now respectfully submit that this instruction should have been given; that when the evidence is freed from all extraneous and irrelevant matter there is nothing whatever of defendant's case which would entitle it to go to the jury. The law of the case was fully settled upon the previous appeal, to the effect that plaintiff's facts made out a *prima facie* cause of action. These facts were again, and even more fully proven at the second trial.

The only remaining ground, therefore, upon which defendant can now rely is its affirmative defense, that the Port Arthur branch was negligent. It will be noted that the agreement to repay did not make proof of non-negligence generally on the part of the Port Arthur branch as a condition precedent to recovery, but only a showing that the drafts had not been indefinitely held after their maturity. This showing was convincingly made.

Nor has any defense been shown, if the action be considered one upon an implied contract. Here, again, defendant's only reliance is upon some proof of negligence on the part of plaintiff. The only negligence claimed is that the bank permitted Clarkson & Co. to sell the flour without payment. The

foregoing analysis of the testimony will show that there is no proof of such sale.

The alleged illegal permission given Short to sell the flour cannot avail defendant, for the reason that it has not been proven to have been consummated. To make this action a ground of negligence which would defeat plaintiff, it was incumbent upon the defendant that it show that by reason of this illegal act it had actually suffered loss. It was obliged to prove not only that the illegal permission had been given, but also *that it had been acted upon*. We have shown that there is no testimony that any of the flour ever left the warehouse under this permission. *Non constat* it is there now.

It is submitted that the judgment must be reversed, and the trial court be directed to enter a judgment against defendant as prayed but we request if a third trial be found necessary that the legal duties of a collecting bank be so clearly defined by this court's opinion that in the event of a new trial no uncertain latitude concerning custom or usage may be allowed to override the clear and settled principles of law.

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IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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RUSO-CHINESE BANK,  
(a corporation)

*Plaintiff in Error,*

*vs.*

NATIONAL BANK OF COMMERCE  
OF SEATTLE, WASHINGTON,  
(a corporation)

*Defendant in Error.*

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No. 2182

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Brief for Defendant in Error

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SEATTLE, WASHINGTON.





# In the United States Circuit Court of Appeals

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RUSSO-CHINESE BANK,  
(a corporation)

*Plaintiff in Error,*

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NATIONAL BANK OF COMMERCE  
OF SEATTLE, WASHINGTON,  
(a corporation)

*Defendant in Error.*

No. 2182

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## Brief for Defendant in Error

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### STATEMENT

The plaintiff seeks to recover from the defendant the sum of \$38,412.19, with interest, being the return of the same amount of money paid to the defendant, the National Bank of Commerce by the plaintiff, the Russo-

Chinese Bank, in two payments, made respectively on November 9th, 1904 and December 29th, 1904.

According to the complaint the plaintiff proceeds upon two theories of the liability of the defendant to pay this money,—one theory that there was an express promise in writing to repay it if it should be ascertained that the Port Arthur Branch of the Russo-Chinese Bank had not collected the money on the draft for \$36,194.80, drawn by the Centennial Mill Company in favor of the National Bank of Commerce on Clarkson & Company of Port Arthur, China; the other that there was an implied promise to re-pay the money if it should be ascertained that the money had not been collected by the Port Arthur Branch, because in that case the money was advanced and paid by the plaintiff to the defendant upon a mistake of fact.

The plaintiff claims that on or about the 11th of December, 1903, the Centennial Mill Company of Seattle had agreed to sell to Clarkson & Company of Port Arthur, China, about 36,000 sacks of flour for the sum of \$36,194.80; that the Centennial Mill Company drew a draft in favor of the defendant for said amount upon Clarkson & Company of Port Arthur, and caused the flour to be shipped on the steamer "Hyades" from Seattle to Port Arthur, receiving from the Boston Steam-

ship Company and the Boston Tow Boat Company bills of lading for the shipment of flour. The bills of lading showed that the consignor was the Centennial Mill Company, the Centennial Mill Company being both consignor and consignee of the shipment; that the shipment was also covered by an insurance policy issued by the Fireman's Fund Insurance Company in the sum of \$40,000; that the bills of lading, insurance policy and other documents were endorsed by the Centennial Mill Company in blank and attached to the draft for \$36,194.80 and delivered with the draft to the National Bank of Commerce of Seattle, the defendant in the action. That the defendant endorsed the draft payable to the order of the Russo-Chinese Bank of Port Arthur; that the draft was received by the defendant at Port Arthur and presented to Clarkson & Company for acceptance about January 30th, 1904. That the draft by its terms became payable on the 30th of April, 1904; that it was not paid at the time of its maturity and that on the 2d of May, 1904, it was protested for non-payment; that a state of war existed between Russia and Japan about the 9th of February, 1904, and during the remainder of that year and that Port Arthur was invested both by land and sea by the Japanese forces; that on the 26th of May, 1904, the plaintiff mailed to the defendant at Seattle, Washington, notice of the non-payment of the draft together with the

draft itself and the official protest of the Notary who protested the draft. That subsequently Port Arthur was captured by the army of Japan and that all of the books, papers and records of the Russo-Chinese Bank were seized by and retained in the possession of the Japanese for more than a year. That while said books and records of said Russo-Chinese Bank were in the hands of the Japanese the defendant demanded from the plaintiff the payment in full of the draft and threatened to sue the plaintiff in the courts of the United States if the draft was not paid and that on the 9th of November, 1904, the plaintiff, being without information as to the payment or non-payment of the draft, and without means of information thereof, paid to the defendant the sum of \$36,113.70 and subsequently on the 29th of December, 1904, paid to the defendant the further sum of \$2298.49, in accordance with the terms of the draft, with the provision that if it should thereafter be ascertained that if the draft had not been paid by Clarkson the sum should be repaid to it by the defendant, and that the defendant assented to such provision. That the plaintiff afterward ascertained that the draft had not been paid and instituted this suit for the collection of the money so paid by it in the aggregate sum above mentioned. (Record pp. 2-6).

To the complaint the defendant filed its amended answer, admitting the drawing of the draft by the Centennial Mill Company with the documents attached, duly endorsed, and that they were sent to the Russo-Chinese Bank at Port Arthur during the time specified in the complaint; admitted that demand was made upon the defendant for the return of the money paid on November 9th and December 29th, 1904, and denied that the draft was not paid by Clarkson & Company prior to the time of the remittances by the plaintiff to the defendant and denied the other allegations of the complaint. For a first affirmative defense the defendant alleged that the draft of December 11th, 1903, for \$36,194.80 was paid by Clarkson & Company to the Russo-Chinese Bank. For a second affirmative defense that the draft and documents were duly drawn, endorsed and delivered to the Russo-Chinese Bank to be delivered upon the payment of the draft. That by reason of the assignment of said draft and the documents by the defendant to the plaintiff it became the duty of the plaintiff under the custom among bankers at Oriental ports, including the port of Port Arthur, and under the law merchant, to present said draft for acceptance upon the day of its arrival or the succeeding day, and that the plaintiff did not present the draft for several weeks thereafter, after an unreasonable delay. That it also became the duty of the plaintiff under the

custom of bankers, as above stated, to look after, protect and care for the flour represented by the bills of lading upon its arrival at Port Atrhur. That it was the duty of said plaintiff to warehouse said flour and to insure the same, and that it became the duty of the plaintiff by reason of the instructions given to the plaintiff by the defendant, and by reason of the custom among bankers, not to permit said flour represented by said bills of lading to be appropriated by Clarkson & Company or by anyone else; that the plaintiff claimed that the flour represented by the bills of lading was appropriated by Clarkson & Company to their own use and that the proceeds to the same were not applied to the payment of said debt or any part thereof. Defendant further alleged in its answer that if the proceeds of the sale of said flour were not used to apply upon the payment of said draft and that the failure to have the same so applied was due to the carelessness and negligence of the plaintiff and was a breach of the duty that plaintiff owed to the defendant to cause the proceeds of the sale of said flour to be utilized for the payment of said draft, and that any failure to have the proceeds of the sale of the flour applied to the payment of the draft, if said proceeds were not so applied, was due to gross carelessness and negligence on the part of the plaintiff for which the defendant was in no wise responsible. That the plaintiff did not



protest the draft on the date of its maturity and did not return the draft and documents accompanying the same, all without excuse or reason, and held the same, to the great injury and damage of the defendant all of which was a gross neglect of the duty owed by the plaintiff to the defendant, as before stated. (Record pp. 7-k4).

To the answer of the defendant the plaintiff duly filed its reply, denying the affirmative allegations thereof (Record p. 15).

Upon the issues thus made up the case proceeded to trial and a general verdict was returned by the jury in favor of the defendant, and, at the request of the plaintiff, a special verdict was also submitted to the jury, and the jury returned a special verdict, as follows:

“We, the jury in the above-entitled cause, find that the Port Arthur Branch of the Russo-Chinese Bank did receive payment for the draft dated December 11, 1903, on account of which the plaintiff made the remittances to the defendant alleged in the complaint. Charles Osner, Foreman.” (Record p. 18).

Thereafter judgment was entered upon the verdict in favor of the defendant.

## ARGUMENT

This is the second appeal in this case. Upon the former appeal this Court held that the action was not an action for the recovery of money upon an express contract but was an action for the recovery of money paid under a mistake of fact, if we correctly interpret the decision of this Court rendered on the 3d of April, 1911, and reported in 187 Fed. p. 80.

On page 37 of the brief of the plaintiff in error filed in this Court upon the former hearing, counsel for the plaintiff in error said:

“It is, however, submitted that the issues framed by the pleadings in this case do not show an attempt to recover upon an express contract but upon an implied agreement to restore money which had been paid under a mistake of fact.”

Taking this contention of counsel in the light of the opinion of this Court we assume that the issues must be construed as stating a cause of action for the recovery of money paid under a mistake of fact and not upon an express contract for the return of the money.

We make these preliminary observations for the reason that we have not yet been favored with a copy of the brief for the plaintiff in error in this case, and must, to some extent, speculate as to the theory that will be

assumed by counsel for the plaintiff in error and also as to what assignments of error will be relied upon by them, reserving the privilege of answering the brief of counsel by a supplemental brief.

THE DRAFT OF DECEMBER 11th, 1903, FOR \$36,194.80 PAID PRIOR TO REMITTANCES BY PLAINTIFF TO DEFENDANT OF AMOUNT SOUGHT TO BE RECOVERED IN THIS ACTION:

If the draft were in fact paid then it is wholly immaterial whether the action was predicated upon express contract or an action to recover money paid under a mistake of fact. The plaintiff caused to be submitted to the jury a special verdict requiring the jury to answer a specific question as to whether or not the original draft was paid by Clarkson & Company, and the jury answered that the draft had been paid by Clarkson & Company. If such is the fact it further becomes immaterial what, if any, errors might have been committed by the lower court upon other branches of the case.

It becomes necessary, therefore, to determine whether there was any evidence sufficient to support the finding of the jury that the draft had been paid.

“The verdict of the jury upon evidence sufficient, if true to support the findings, cannot be disturbed by the Supreme Court.”

*Pachko v. Wilkeson Coal & Coke Co.*, 46 Wash., 422.

“The Supreme Court will not set aside a verdict because of conflict in evidence supporting it.”

*McKay v. Anderson Steamboat Company*, 51 Wash., 679.

*Edwards v. Seattle, Renton & Southern Ry. Co.*, 62 Wash. 77.

“The weight and preponderance of the evidence is for the jury where the evidence is conflicting.”

*Richardson v. Agnew*, 46 Wash., 117.

“A verdict upon conflicting evidence will not be set aside upon appeal, although contrary to the conviction of the Supreme Court.”

*Warwick v. Hitchings*, 50 Wash., 140.

*Meador v. Northwestern Gas & Elec. Co.*, 55 Wash., 47.

*Bennett v. Seattle Elec. Co.*, 56 Wash., 407.

*Kincaid v. Walla Walla Valley Traction Co.*, 57 Wash., 334.

*Olmstead v. Olympia*, 59 Wash., 147.

And this Court has frequently held that if there is any evidence sufficient if true to support the verdict of the jury, such verdict will not be disturbed on appeal, even though the evidence be conflicting and of such conflicting character that the Appellate Court would have reached a contrary conclusion from that reached by the jury.

“It may be that if we were to usurp the functions of the jury, and determine the weight to be given to the evidence, we might arrive at a different conclusion. But that is not our province on a writ of error. In such a case we are confined to the consideration of the exceptions, taken at the trial, to the admission or rejection of evidence, and to the charge of the court and its refusals to charge. We have no concern with questions of fact, or the weight to be given to the evidence which was properly admitted.”

*Insurance Co. v. Ward*, 140 U. S., 77, 70 Fed., 677.

What, then, does the testimony disclose in regard to the payment of the draft by Clarkson & Company? A number of plaintiff's witnesses have testified that the draft was never paid. However, there was an abundance of competent testimony introduced on the part of the defendant sufficient to support the finding of the jury.

The Russo-Chinese Bank is a single corporation with branches at Vladivostock, Port Arthur, Shanghai and elsewhere, but the various branches and the home office are one and a single corporation.

The evidence shows that the Vladivostock branch of the Russo-Chinese Bank in the spring of 1904 sent a telegram to the Shanghai branch of said bank to be delivered to Clarkson & Company, stating that all of the drafts of the Centennial Mill Company drawn through the National Bank of Commerce of Seattle had been paid. It is true that the officials of the plaintiff bank testified

that this telegram was sent at the request of Clarkson & Company and without any knowledge on the part of the Vladivostock branch as to whether or not the drafts, including the one in controversy, had been paid. But the jury might well have believed that the Vladivostock branch was authorized to make such statement and to send such telegram. Port Arthur was almost entirely cut off from the outside world during the spring and summer of 1904. Only telegrams to the Russo-Chinese Bank from its branches were permitted to be passed into the city by the Japanese authorities. Clarkson could not have any direct communication with the bank at Port Arthur. The only means of communication on the part of Clarkson was through the branch banks. His only source of information was through the Vladivostock branch. It is inconceivable that the Vladivostock branch of the Russo-Chinese Bank would have sent such a telegram upon the statement of Clarkson alone, because that branch bank knew that Clarkson had no information as to whether the drafts had been paid and that he could have no information upon that subject except such as he acquired through the Vladivostock branch, which was permitted to communicate by wire with the Port Arthur branch of the same bank; and Mr. Clarkson, called as a witness for the plaintiff, testified as follows: "I am unable up to the present time to say whether I was mistaken



in my statement that the draft had been paid, or not.” (Record p. 115).

Again, the evidence shows that 79,000 rubles were transmitted from the Port Arthur branch to the Vladivostock branch between the 25th of March and the 26th of June, 1904, and that between the first of January, 1904 and March 23rd, 1904, 126,128 rubles were transmitted on account of Clarkson from Port Arthur to Vladivostock, and that the same was appropriated by the Port Arthur bank toward the liquidation of the indebtedness of Clarkson & Company to the defendant. (Record pp. 151-2). The evidence further shows that at the time of the commencement of hostilities between Russia and Japan there were only 6000 or 8000 sacks of flour in Clarkson’s warehouse at Port Arthur upon the arrival of the “Hyades” flour; that Clarkson had very little other goods of any kind in addition to his stock of flour; that the Port Arthur bank had in its possession bills of lading for all of this flour and that in the early part of February, 1904, it received notice from Clarkson through the Vladivostock bank that W. S. Davidson had sold a large quantity of flour, or practically all of the flour then in Clarkson’s warehouse to one Gipsburg, at a very much reduced price and the Port Arthur bank was directed to prevent the consummation of this sale, and that the bank did intervene in the mat-

ter and did succeed in preventing the consummation of the sale of the flour to Ginsburg at the prices agreed upon between Davidson and Ginsburg,—Davidson claiming to be at that time the representative of Clarkson & Company. So that the Port Arthur bank in February, 1904, had its attention called to the fact of the sale of a large quantity of flour by Clarkson & Company and it must have known that the moneys paid over to it by Clarkson & Company and remitted by the Port Arthur branch to the Vladivostock branch were, in large part, the proceeds of the sale of flour for which the Port Arthur branch had bills of lading to cover the drafts of the National Bank of Commerce, and yet, with this knowledge, it diverted the money from the Seattle bank to reduce the indebtedness of Clarkson to itself. Moreover, Mr. Short in his testimony stated that he advised the manager of the Port Arthur branch of the arrival of the “Hyades” flour and received permission from him to sell the flour and that he agreed to account to the bank for the proceeds of the sale thereof when made by Clarkson & Company. Notwithstanding this knowledge the bank withdrew, as above stated, 79,000 rubles from Clarkson’s account at Port Arthur and remitted it to Vladivostock. There was certainly evidence tending to show that the Port Arthur bank must have known where the money paid over by Clarkson & Company to the Port

Arthur bank came from and must have known that it came from the sale of flour covered by bills of lading in their hands for collection, and the jury was certainly justified in finding from this evidence that the drafts had been paid by Clarkson & Company to the Port Arthur bank and had been appropriated by the Port Arthur bank to other purposes than remission to the National Bank of Commerce.

Again, on the 30th of April, 1904, the bank's witnesses admit that Clarkson paid over to the Russo-Chinese Bank at Port Arthur 67,000 rubles, the proceeds of the sale of the flour made to Ginsburg, and the jury was justified in reaching the conclusion that this money was the proceeds of the sale of the "Hyades" flour covered by the bills of lading held by the Port Arthur bank to secure the draft of \$36,194.80 in controversy. The Port Arthur bank, knowing that it had in its possession certain drafts secured by bills of lading covering flour in Clarkson's warehouse could not be permitted to blindly close its eyes and allow Clarkson to sell this flour and then appropriate the proceeds thereof to any other purpose than the payment of the draft securing the same. During a state of war, with Clarkson himself absent and their managers driven out of the city, can it be possible that the officials of the

bank did not visit Clarkson's warehouse and obtain actual knowledge of the stock belonging to Clarkson, and which was being sold? If they had this knowledge that the proceeds of the sale were largely coming from the flour, it would be the grossest injustice to permit the Port Arthur bank to close its eyes and say that it did not know the source from which the money being paid over by Clarkson to them came, and with such knowledge of where the money came from the Port Arthur bank ought not, in good conscience, be permitted to say that it did not receive payment of the draft in question.

The Port Arthur bank further admitted that on April 30th, 1904, it received 67,000 rubles from Ginsburg, placed 25,000 rubles to the credit of Clarkson in its bank and remitted the balance to the National Bank of Commerce on account of other drafts which we shall mention later in this discussion. And yet at the time of the arrival of the "Hyades" flour securing the draft in question, there were only 6,000 or 8,000 sacks of flour in Clarkson's warehouse, so that the evidence traces into the Russo-Chinese Bank at Port Arthur the entire proceeds of the sale of the flour covered by the bills of lading in their possession

Moreover, the jury was justified in reaching the conclusion that the draft had been paid from other tes-

timony introduced in the evidence and which was not contradicted by the testimony of plaintiff's witnesses.

The Court will recall that the flour was originally owned by the Centennial Mill Company. It agreed to sell the flour to Clarksen & Company at Port Arthur; it drew a draft on Clarkson & Company for \$36,194.80 in favor of the National Bank of Commerce of Seattle; procured bills of lading from the steamship company for the flour, together with insurance policies, and endorsed and transferred the bills of lading and the insurance policies to the National Bank of Commerce and the National Bank of Commerce in turn endorsed and transferred the draft to the Russo-Chinese Bank at Port Arthur and delivered the bills of lading and other documents to the Port Arthur bank, which received them. The bills of lading were collateral to the draft and were pledges for its payment. Bills of lading, under the statutes of the State of Washington, were negotiable instruments, and the endorsement and delivery of the bills of lading transferred the legal title of the documents to the Russo-Chinese Bank and the legal effect of the transaction was to transfer the title to the flour covered by the bills of lading to plaintiff.

“All bills of lading and transportation receipts of every kind are hereby declared negotiable, and may be transferred by endorsement of the party to whose order

such check or receipt was given or issued, and such endorsement shall be deemed a valid transfer of the commodity represented by such receipt and may be made in blank or to the order of another."

2 Rem. & Bal. Code, 3377.

"When a bill of lading or warehouse receipt is made to 'bearer' or in equivalent terms, a simple transfer thereof by delivery conveys the same title as an endorsement."

2 Rem. & Bal. Code, 3379.

So that the Russo-Chinese Bank, under the laws of the State of Washington, held the legal title to the flour securing the draft. It not only had the legal title to the bills of lading but it had the legal title to the flour itself. The statute above quoted is the law of the State of Washington, and in the absence of proof to the contrary must be regarded as the law at Port Arthur regulating bills of lading.

The flour was collateral security for the payment of the draft in question, and we believe it to be a well settled principle of law that where a pledgee, without specific instructions, takes over the collateral to itself, or releases the collateral from the pledge, such release of the collateral operates in law as payment of the claim, at least to the extent of the value of the collateral.

"It is a general rule that where collateral security is received for a debt, with power to convert the security into money, this is specifically applicable to the



payment of such debt; the same person being the party to pay and receive, no act is necessary, and the law makes the application. If the proceeds equal or exceed the amount of the debt it is *de facto paid*; no action would lie for it; and proof of these facts would support the defense of payment. It is like the ordinary case of a banker or factor receiving securities of his principal, by endorsement or otherwise, on which he has a lien for his advances; when received the proceeds operate as a payment *pro tanto*. It follows as a necessary consequence, that an amount equal to the existing debt only can be applied; the debt is then satisfied and discharged and if there be a surplus it is money had and received to the use of the endorser the beneficial proprietor of the note. It is money which the defendant cannot hold."

*Hunt v. Nevers*, 32 Mass., 504.

"When the collateral note is collected and the proceeds received by the pledgee, it operates as a payment *pro tanto* of the debt secured."

*Randolph on Commercial Paper*, 795.

In *Cocke v. Chancy*, 14 Ala., 65, it is held that when a creditor who has received a note as collateral security transfers it to another he must be understood to have elected that mode of payment and to have made the security a substitute for the debt. *Westphal v. Ludlow*, 6 Fed., 348. *Gilliam v. Davis*, 7 Wash., 332.

A. T. Short, a witness for the defendant, testified that he was Assistant Manager for Clarkson & Company at Port Arthur until the early part of February, 1904. That upon the arrival of the Steamship "Hyades"

with the flour securing the draft in question, he went to the Russo-Chinese Bank at Port Arthur and stated to Mr. Ofsiankin, the manager of the defendant bank at Port Arthur, that the goods had arrived; that this was about the middle of January, 1904, and that he accepted the draft and at the same time, on behalf of Clarkson & Company, gave a letter of guaranty to the Port Arthur bank containing the provision that the flour was the property of the Russo-Chinese Bank until paid for and agreed in such letter that Clarkson & Company would sell the flour and account to the bank for the proceeds thereof, (Rec. pp 140-143-155) and further testified that the manager of the bank directed Clarkson & Company, through him, to take over the flour, sell it and account to the bank for the proceeds, and that this arrangement was the one invariably made between the bank and Clarkson & Company covering all shipments of flour made by the Centennial Mill Company.

The testimony as to this letter of guaranty and the permission given by Ofsiankin to Short is not contradicted; neither is the testimony of Ofsiankin produced by the plaintiff in this case, although the evidence shows that Ofsiankin at the time the depositions were taken on behalf of the plaintiff was the resident manager of the defendant bank at Vladivostock. The Port Arthur

bank disregarded its instructions to deliver the documents and the flour only upon payment of the draft, and by an arrangement with Clarkson & Company took over the title to the flour and affirmatively consented to the sale of the flour by Clarkson & Company upon their promise to account for the proceeds to the bank at Port Arthur. This transaction amounts in its legal effect to a taking over of the goods by the Port Arthur bank itself and amounts to a payment of the draft by Clarkson & Company to the Port Arthur bank in so far as the rights of the National Bank of Commerce are concerned.

“Upon the plea of payment, to debt on bond, it is competent for the defendant to give in evidence that wheat was delivered to the plaintiff on account of the bond at a certain price; and that the defendant assigned sundry debts to the plaintiff, part of which were collected by the plaintiff, and part lost by his indulgence or negligence.”

*Buddicum v. Kirk*, 3 Cranch (U. S. Sup. Ct. 294).

*Reeves v. Plough*, 46 Ind., 350.

“Where a shipper consigned goods to his own order, at the time drawing in favor of a bank ‘for collection’ a draft on the person to whom the goods were to be delivered on payment of the draft, and attached the draft to a bill of lading so endorsed as to give the bank control of the possession of the goods, a delivery of the goods by the bank to the drawee of the draft, without requiring its payment, was, as against the owner, a conversion.”

*Hobbs v. Chicago Packing & Provision Co.*, 25 S. E., 584.

The evidence of Short as to the letter of guaranty under which Clarkson & Company took over the flour under an agreement to account to the Port Arthur bank for the proceeds of the sale of the flour was admissible under the plea of payment and was evidence of payment and the jury was justified, on this evidence alone, in making the finding that the draft was in fact paid. The Port Arthur bank rendered itself immediately liable to the National Bank of Commerce when it released the collateral and consented that Clarkson should take the flour and sell it and account to the bank for the proceeds, and the Port Arthur bank as against the National Bank of Commerce or in so far as its rights were concerned, acquired the title to the flour and could only look to Clarkson for its reimbursement. The draft was in fact paid and the special finding of the jury is amply supported by the evidence.

THE PLAINTIFF CANNOT RECOVER IN THIS ACTION EITHER UPON AN EXPRESS CONTRACT OR FOR MONEY PAID UNDER MISTAKE OF FACT BY THE RUSSO-CHINESE BANK AT THE TIME THE REMITTANCES WERE MADE ON NOVEMBER 9th, 1904, AND DECEMBER 29th, 1904, IF IT WAS IN-

DEBTED AT THAT TIME IN THE AMOUNT OF SUCH PAYMENTS TO THE NATIONAL BANK OF COMMERCE:

The first remittance was made November 9th, 1904, and the letter transmitting it contained the following provisions:

"It remains of course however understood that in case your above remittance proves not to have been paid for by Clarkson & Company you are held responsible to refund the amount of our to-day's cheque." (Rec. p 92.)

On December 5th, 1904, the National Bank of Commerce acknowledged receipt of this letter and stated that said remittance was not sufficient to cover the draft, and further said:

"We on our part agree upon return to us of both sets of bills, showing that the draft has not been paid, to reimburse you in the sum paid us, providing that we were in no wise injured by the fact that your Port Arthur branch has indefinitely held the bills after their maturity, at which time they could have been returned to us and we could have collected from the Steamship Company." (Rec. p 93.)

On December 29th, 1904, the Russo-Chinese Bank acknowledged the receipt of the letter of December 5th from the National Bank of Commerce and remitted the additional sum of \$2,298.49. The National Bank of Commerce on January 18th, 1905, acknowledged receipt of the remittance and referred to the additional conditions upon which it agreed to make the return.

The Court will observe that the purpose of the National Bank of Commerce was to proceed against the Steamship Company if the Steamship Company had turned the goods over to Clarkson & Company without the payment of the draft, but the evidence of Mr. Short shows that the Russo-Chinese Bank, which held the legal title to the bills of lading and the flour, notified Clarkson & Company through Short, who was the agent of the Steamship Company, that delivery of the flour could be made to Clarkson & Company, Merchants, and that the flour could be sold by Clarkson & Company. This evidence was not contradicted, and it would have been useless, in view of these facts, for the National Bank of Commerce to have proceeded against the Steamship Company, because the Russo-Chinese Bank at Port Arthur had relieved the Steamship Company from any liability whatsoever, if the testimony of Mr. Short is to be believed, and the jury undoubtedly did believe it. The Russo-Chinese Bank, therefore, by its action in taking over the flour itself and consenting to the sale of it by Clarkson, on his promise to account to that bank for the proceeds of the sale thereof, released the Steamship Company and placed it beyond the power of the National Bank of Commerce to resort to that remedy. The Steamship Company had a right to release the flour upon the production of the bills of lading. If the Port



Arthur branch held the legal title to an possession of the bills of lading that bank was the only person who had the legal right to direct the Steamship Company to release the flour.

In the case of the *First National Bank of Pullman v. Northern Pacific Railway Company*, 28 Wash., 439, the Court held that the Railway Company was not authorized to release a shipment to anyone except the holder of the bill of lading and held the Railway Company liable for the release of the shipment, even upon the order of the consignor of the wheat.

"A bill of lading is negotiable and under this section when made to 'bearer' or in equivalent terms, a simple transfer thereof by delivery conveys the same title as an endorsement; hence the power of endorsement is not restricted to the consignee, but the carrier who has delivered such bill of lading to the shipper is conclusively charged with knowledge of the fact, and of its negotiability, both by custom and statute."

*First Nat'l Bank v. N. P. Ry. Co.*, ~~40~~ 28 Wash 439

Furthermore, it would be grossly unconscionable to allow the Russo-Chinese Bank to recover back the money in controversy from the National Bank of Commerce, when the uncontradicted evidence shows that the Russo-Chinese Bank has rendered itself liable to the National Bank of Commerce by reason of its affirmative acts in causing the shipment to be released by the Steamship Company and in affirmatively consenting to take the

flour over itself and allow the same to be sold by Clarkson & Company upon the promise of Clarkson & Company to reimburse the Russo-Chinese Bank, even though it should be found that Clarkson & Company never paid the Russo-Chinese Bank.

#### GINSBURG TRANSACTION:

It will be contended, however, that when Ginsburg paid the 67,000 rubles on April 30th, 1904, for the flour purchased by him from Clarkson & Company, the Russo-Chinese Bank remitted about 42,000 rubles of this money to the National Bank of Commerce in payment of two certain drafts, one for \$4,136 and the other for \$16,155. These two drafts were similar to the one in controversy and represented the purchase price of two shipments of flour made by the Centennial Mill Company to Clarkson & Company, and drafts were drawn for the amount of the shipments with bills of lading and documents endorsed and attached as in the case of the draft for \$36,194.80. Mr. Short testified that the same arrangement as to the letter of guaranty and the taking over of the flour by the Russo-Chinese Bank and the sale of the same by Clarkson & Company under the promise to account for the proceeds of the sale of such flour to the Russo-Chinese Bank was made as in the case of the Hyades flour; so that it is manifest that at the time

the Russo-Chinese Bank paid the two drafts for \$4,136 and \$16,155 respectively on the 30th day of April, the Russo-Chinese Bank was already liable for the amount of these drafts to the National Bank of Commerce. Contrary to instructions they had taken a letter of guaranty from Clarkson & Company and consented to the release of the flour from the Steamship Company and consented affirmatively to its being taken over and sold by Clarkson & Company, and if the Port Arthur branch did pay these drafts out of the proceeds of the sale of the flour to Ginsburg, it was paying its own obligation out of the money realized from the sale of flour pledged for the payment of the \$36,194.80 draft. Consequently it is immaterial whether the National Bank of Commerce received the money from Ginsburg or whether it did not. In paying over the money for the amount of these two drafts, the Port Arthur branch was paying its individual indebtedness to the National Bank of Commerce which it had become obligated to pay by reason of its taking the letter of guaranty from Clarkson & Company at the time of the arrival of the shipment securing the two drafts, and the testimony of Short in regard to the arrangement as to the letter of Guaranty is corroborated by the testimony of Davidson and the testimony of Clarkson, and Clarkson testified that he had given instructions to the manager at

Port Arthur never to take any goods out of the warehouse which had been brought over by steamer unless the bill of lading was produced or unless his manager procured permission from the bank and had made satisfactory arrangements with the bank for the release of the goods

#### PAYMENT OF AMOUNT OF DRAFT BY CENTENNIAL MILL COMPANY:

It will also be contended that the Centennial Mill Company had already paid the National Bank of Commerce the amount of the draft in question and that the National Bank of Commerce was not injured in any way by any negligence or wrong doing on the part of the Port Arthur bank, inasmuch as it had received its money.

The testimony shows that after the defendant had received the amount of the drafts on November 11th, 1904, it paid this money over to the Centennial Mill Company and the Centennial Mill Company now has all of the money that the National Bank of Commerce received from the Port Arthur bank. Further, if the National Bank of Commerce was not acting as the owner of the shipment after it had been re-paid its advances by the Mill Company, still it was acting as the agent and rep-

representative of the Mill Company and we fail to see how the rule of law could be different in the one case from that in the other.

It is claimed the money was paid over under a mistake of fact and the law imposed the same duty to act in good faith and obey instructions, whether these instructions were given by the real owner or by the agent of another. The Port Arthur bank had no more legal right or authority to disregard the instructions given by the National Bank of Commerce, whether it was acting as owner or agent and we fail to see any merit in this contention.

The evidence shows that the Russo-Chinese Bank took over this flour on its own account and allowed it to be sold by Clarkson & Company and if it failed to collect from Clarkson there is no legal reason why it should not be compelled to account to the Centennial Mill Company or to the National Bank of Commerce as agent than it would be to account to the National Bank of Commerce as the owner of the property.

FIRST, SECOND AND THIRD ASSIGNMENTS OF  
ERROR: (Rec. pp 243-248).

The three enumerated assignments of error all relate to certain interrogatories propounded to R. R. Spencer, a witness on behalf of the plaintiff, and the questions and answers all bear upon the admissibility of evidence as to the customs among bankers in the handling of drafts secured by bills of lading, such as the one involved in this controversy. Counsel objected to the questions upon the ground that this was not a case where proof of a custom could be shown, inasmuch as it was contended by the plaintiff and the defendant that a special contract existed between the plaintiff and the defendant in the handling of this particular shipment of flour represented by the bills of lading securing the draft of \$36,194.80. This contract which counsel alleges makes improper any evidence as to admissibility of proof of custom is found on page 123 of the record, and consists of a letter dated January 22nd, 1904, written by the Russo-Chinese Bank to the National Bank of Commerce and the particular provisions upon which counsel for plaintiff apparently relies are found in paragraphs two and three of the letter in question.



We call the Court's attention to the fact that the draft for \$36,194.80 with the documents was sent by the National Bank of Commerce to the Russo-Chinese Bank on December 11th, 1903, with instructions to deliver against payment and there is no proof of any assent by the National Bank of Commerce to the conditions attempted to be imposed by the letter of January, 22nd, 1904. The testimony of Mr. Short is to the effect that the Russo-Chinese Bank accepted the collection and took over the handling of the goods during the latter half of January, 1904. The plaintiff by accepting the collection upon the terms contained in the letter written by the National Bank of Commerce transmitting the draft and the documents, and this letter only directed the delivery of the goods upon the payment of the draft. Consequently the proof of the existence of a custom in regard to the handling of drafts was clearly proper under the pleadings and under the facts in this case.

Moreover, we desire to call the Court's attention specially to paragraphs two and three of the letter of January 22nd, 1904 (Rec. p. 123). Paragraph two simply asks the National Bank of Commerce to give specific instructions but does not state what the Russo-Chinese Bank would do unless such instructions be given. Presumably the Russo-Chinese Bank would follow the custom of bankers in the handling of collections such as

the one in question and proof of what that custom was is clearly admissible, and the testimony of Mr. Short only went to show what the custom was, in the absence of specific instructions, in the handling of documents, and we submit that the letter does not show any special contract

Paragraph three of the letter of January 22nd, 1904, is as follows:

“Our Bank does not guarantee that the goods be stored in due time when there is no storage accommodation obtainable, and takes no responsibility whatever if the same are not landed in perfect condition, nor if the goods are deteriorating or becoming of lower value in consequence of price fluctuations while under our Bank’s control.”

This provision requires a careful analysis. In the first place the bank says that it does not guarantee that the goods be stored in due time when there is no storage accommodation obtainable. This clause specifically expresses the particular instance in which the Russo-Chinese Bank will not guarantee the storage of goods. The inference must follow that in all other cases the bank would store the goods. The bank impliedly undertakes that it will see to the storage of the goods; it only denies responsibility for failure to store when there are no storage accommodations, and the evidence shows that there were other independent warehouses at Port Arthur at the time of the arrival of the goods

in question, and that the Russo-Chinese Bank knew of the goods and knew that Clarkson had them in his possession, and knew that he was the agent of the Steamship Company.

The letter further states that the bank will not be responsible for deterioration or fluctuations in prices "*while under our bank's control.*" This clause expressly recognizes the fact that the goods themselves were under the control of the bank. The Russo-Chinese Bank by the writing of that letter must be conclusively presumed to have intended to exercise physical control over the flour except in the specified cases above enumerated in said letter. What the duty of the bank was and what was the custom among banks was clearly admissible under the pleadings. The affirmative defense of the defendant pleads the custom among bankers and the custom at Port Arthur, and the evidence was properly admitted.

The evidence was properly admitted upon another ground. The testimony of the defendant's witnesses disclosed that the Russo-Chinese Bank had taken a letter of guaranty from Clarkson & Company in which Clarkson was compelled to recognize the ownership of the flour in the Russo-Chinese Bank. This affirmatively shows that notwithstanding the terms of the letter

of January 22nd, 1904, the Russo-Chinese Bank had not only the possession but the actual ownership of the flour itself, and the evidence was admissible to show that such action on the part of the Russo-Chinese Bank was contrary to the general usage and custom among bankers in the handling of drafts and collateral such as that in controversy in this action.

#### FOURTH, FIFTH, SIXTH, SEVENTH, EIGHTH AND NINTH ASSIGNMENTS OF ERROR:

(Rec. pp 248-252).

These assignments of error all relate to the admissibility of testimony, and what has been said as to the preceding assignments of error is equally pertinent in this connection, and we do not consider it necessary to discuss these assignments of error any more fully.

#### TENTH AND ELEVENTH ASSIGNMENTS OF ER- ROR: (Rec. p. 252).

These assignments are wholly without merit and even if there were any errors committed they are harmless.  
TWELFTH ASSIGNMENT OF ERROR: (Rec. p 253).

Counsel for plaintiff objected to the following question propounded to the witness A. T. Short.

Q. In all your dealings with the Russo-Chinese Bank in handling the other shipments of the Centennial Mill Company, I will ask you what arrangement, if any, was made with the bank in regard to the handling of this flour?

The question was competent, pertinent and material. The contention is made by the Russo-Chinese Bank that the 67,00 rubles received by the Port Arthur bank on the 30th day of April, 1904, were applied to the extent of 42,000 rubles toward taking up the two drafts of \$4,136 and \$16,155 drawn by the Centennial Mill Company in favor of the National Bank of Commerce upon Clarkson & Company; that the proceeds of the sale of the "Hyades" flour securing the draft in controversy were paid over to the National Bank of Commerce on other drafts owned by it and consequently that the Seattle bank was not injured because the Ginsburg money was in part received by the Seattle bank.

It is the contention of the defendant that the \$4,136 draft and the \$16,155 draft are each secured by bills of lading and that the drafts were drawn against payment and the question was material in showing that the Russo-Chinese Bank had taken a letter of guaranty in connection with these two drafts and had consented that Clarkson should sell the flour and account to the Russo-Chinese Bank for the proceeds of the sale thereof; that the Russo-Chinese Bank by doing so had be-

come obligated to the National Bank of Commerce upon these two drafts and that the diversion of the Ginsburg money, while it came in part to the National Bank of Commerce, it nevertheless was a payment by the Russo-Chinese Bank of its individual obligation, incurred by reason of its negligence in handling the two drafts in question. No error was committed in admitting this testimony.

#### THIRTEENTH ASSIGNMENT OF ERROR:

(Record p. 253)

The plaintiff objected to the following question propounded to the witness Short:

“Did they know that Clarkson & Company were in possession of the ‘Hyades’ flour or thirty-six thousand sacks?”

to which the witness answered:

“They could not help but know it.”

Whether or not the Russo-Chinese Bank knew that Clarkson & Company was in possession of the flour was certainly a material matter and the defendant was entitled to have the witness state whether the bank knew of such possession by Clarkson & Company. There might be some question as to the weight to be attached to the testimony by the jury, but it was certainly competent



evidence from which the jury could infer this knowledge on the part of the Russo-Chinese Bank.

#### FOURTEENTH ASSIGNMENT OF ERROR:

(Record p. 253)

The answer of the witness Short to which the plaintiff objected was as follows:

“I would tell them or Davidson would tell them. The object of getting a ninety days’ sight draft was that we could get delivery without payment, but that we paid the money as soon as we got it. As soon as the flour was sold the money was collected in.” (Record p. 146).

The witness was testifying as to knowledge on the part of the Port Arthur bank that Clarkson was the agent of the Steamship Company. The statement of the purpose in making the arrangement as to the letter of guaranty was a part of the *res gestae* and even if erroneous was entirely harmless.

#### FIFTEENTH ASSIGNMENT OF ERROR:

(Record p. 253).

In this assignment the plaintiff complains of the instruction given by the trial court, and the plaintiff has numbered the instruction about which it complains under this assignment of error and we shall discuss the instructions under the numbers specified by the plaintiff in its assignments

*First Instruction:*

As we have heretofore shown, Sections 3377 and 3378, 2 Rem. & Bal. Code, provide that bills of lading are negotiable in character and an assignment or transfer of a bill of lading should be deemed a valid transfer of the commodity represented by the bill of lading, and these sections of the Code have been construed by the Supreme Court of the State of Washington in the case of the *First National Bank of Pullman v. Northern Pacific Railway Company*, 28 Wash., 439, above mentioned. The law of Port Arthur, in the absence of proof to the contrary, must be presumed to be the same as the law of the State of Washington, and there was no proof to the contrary. The statutes of the State of Washington upon this subject must be read into and must be construed to be a part of the contract relating to the bills of lading in this case; so that there can be no question but that the legal title to the flour was vested by virtue of the assignment of the bills of lading in the Russo-Chinese Bank. No error, if any, contained in the instruction quoted in the assignment of error at page 254 of the record, can be presented to this Court, except that portion of the instruction to which the plaintiff excepted at the time of the trial. The exception taken by the plaintiff at the trial is found on page 231 of the record, and is as follows:

“We except to the giving of the instruction to the effect that the defendant bank became invested by virtue of the transfer to it of the documents with the legal title to the flour; and also to the instruction and to each and every part thereof to the effect that by the endorsement and transfer of those documents the plaintiff bank became invested with the legal title to the flour.”

No other objection to the instruction can be urged at this time. The plaintiff is limited to that portion of the instruction covered by its exception, and the instruction, in view of the statutes above quoted and the decisions of the Supreme Court of Washington, unmistakably shows that the legal title to the flour was in fact vested in the Russo-Chinese Bank. There was unquestionably a symbolical delivery of the flour and a transfer of the legal title to the Port Arthur bank, and there was no error in this portion of the trial court's instruction.

### *Second Instruction:*

The second instruction complained of by plaintiff is as follows:

“It was authorized to do whatever was necessary in the manner of incurring expense, which would be chargeable against the property, and to be compensated out of the property in its hands, and it was required to deal with the property in the same way that an intelligent and prudent owner of property would deal with his own property, to act for and in place of the National Bank of Commerce in handling the business there at Port Arthur as the National Bank of Commerce would

have acted if it had been there, and in a position to act for itself. As the agent for the owner it was obligated to account for the amount of the draft, to account for the security which the bill of lading constituted, and it cannot be excused from obligation to account by saying that the flour disappeared without its knowledge, and require the defendant in this case in order to fasten an obligation upon it, to prove that it was negligent. A principal does not have to prove those things in regard to property or valuables that go into the hands of an agent; the agent must render an account in order to be cleared of obligation and liability. That is the rule that is to be applied in this case in determining whether the plaintiff in this case paid out money which it was not obligated to pay to the defendant on account of the draft."

The exception to this instruction is as follows:

"We except to the instruction given to the effect that the Russo-Chinese Bank was obliged to look after and take care of the flour."

The effect of the instruction is simply that the Russo-Chinese Bank was required to exercise ordinary care and diligence in performing its duties as the agent of the National Bank of Commerce in making the collection and looking after the flour, and if the legal title was vested in the Russo-Chinese Bank, then the conclusion would be inevitable that it was the duty of the Russo-Chinese Bank to exercise ordinary care and diligence in protecting the collateral. But even if such should not by this Court be held to be the law, the instruction is entirely immaterial in view of the uncontradicted tes-

timony in the case. The testimony discloses, as we have heretofore shown, that the Port Arthur bank did take over the flour; did take a letter of guaranty, by which Clarkson was compelled to recognize the ownership of the flour in the Port Arthur Bank, and that Clarkson was required to give to the Port Arthur bank an agreement to sell the flour and account to that bank for the proceeds thereof. It makes no difference whether the law required the Port Arthur bank to look after the flour or not, in view of the record, which unequivocally discloses that the bank did take over the flour and did attempt to look after it, and in view of the letter of January 22d, 1904, wherein the Port Arthur bank said it would not guarantee storage unless storage facilities were obtainable and the evidence shows that there were independent warehouses wherein the flour might have been stored.

*Third Instruction:*

The third instruction complained of by the plaintiff is as follows: (Record p. 255).

“If the bank at Port Arthur neglected its obligations or failed to perform its obligations in regard to presentation and demand of payment and protest and giving notice, then it became liable to the defendant for the amount of the draft and for all that it received from the plaintiff bank in the case. If so liable the plaintiff bank has no right of action now to get the money back that it did pay to meet that liability.”

The objection to this instruction was that the plaintiff became liable for the full amount of the draft and not for the amount only of the damage actually suffered.

We think that this instruction correctly stated the law, but even if it did not, the plaintiff cannot complain in view of the uncontradicted testimony.

The evidence shows that the flour was worth about two and one-half roubles per sack, and that a rouble was worth about 50 cents American money, so that the value of the flour is affirmatively shown to have been more than equal to the amount of the draft.

*Fourth Instruction:*

The plaintiff has quoted on page 255 of the record that portion of the instruction about which it complains, but we think that the Court should consider the entire instruction upon the question of burden of proof as given by the Court, which is as follows:

“The burden of proof rests upon the plaintiff in this action to establish by a fair preponderance of the evidence that the draft in question was not paid by Clarkson & Company to the Russo-Chinese Bank and that at the time the money in controversy was paid by the plaintiff to the defendant the Russo-Chinese Bank was not indebted to the defendant in the amount of said draft and that the plaintiff had not rendered itself liable to the defendant by permitting Clarkson & Company to appropriate the flour covered by the bill of lading securing the draft, and unless the plaintiff established by a fair preponderance of evidence the fact that such



payment was not made by Clarkson & Company prior to the date of the payment of the money in controversy by the plaintiff to the defendant, and that the plaintiff had not rendered itself liable by permitting Clarkson & Company to sell the flour prior to the payment of the draft, then I instruct you that the plaintiff cannot recover in this action and your verdict must be for the defendant."

Whether the action be regarded as one upon an express contract or an action for the recovery of money paid under a mistake of fact, the plaintiff, in the very nature of the case, must establish that the payment was not made by Clarkson & Company to the Russo-Chinese Bank. The law says that such proof must be made by the plaintiff and in case of a claim to recover money paid under a mistake of fact, the fact of the mistake must be established; and the plaintiff recognized this burden at the time it filed its complaint. In fact, the non-payment of the draft by Clarkson & Company was the very gist of the action from the view point of the plaintiff.

"The burden of proving the right to recover back payments is ordinarily on the plaintiff."

30 Cyc., 1325, and cases cited.

"Upon an issue raised by defendant as to the conversion of collaterals by the pledgee, the burden is on the pledgee to account for them."

31 Cyc., 870.

"When a creditor receives from his debtor notes or other securities as collaterals he becomes a bailee of such securities and as such he is bound to use ordinary dili-

gence, such as persons usually exercise in reference to their own matters, in endeavoring to collect such securities, unless there is an express agreement relieving him of such obligation, and the true rule is that where the creditor receives from his debtor either notes or obligations of any kind of third persons, as collateral security for the payment of his debt, he cannot, in the absence of an express agreement to the contrary maintain his action for the recovery of his debt without accounting for the collaterals by showing either that he has collected them and applied them as credits upon the debt, or that he could not by the use of due diligence collect them. We do not think there was any error, therefore, in charging the plaintiffs with so much of the collaterals as they failed to collect by reason of their failure to exercise due diligence, there being no evidence that they could not be collected by the use of due diligence."

*Montague v. Stelts*, 15 S. E., 968.

So far as the question as to whether or not the draft was actually paid by Clarkson & Company to the Port Arthur bank is concerned, we do not think there can be any sort of question as to the burden being upon the plaintiff in this action to establish such fact of the non-payment and whether the actions on the part of the plaintiff in turning over the goods to Clarkson & Company and taking the letter of guaranty from Clarkson & Company rendered the plaintiff liable to the defendant, we do not think there can be any doubt upon this proposition. The plaintiff had the legal title, the absolute power to control the shipment; it exercised that power and turned the goods over to Clarkson & Company upon

the promise of Clarkson & Company to pay for them, and the moment that the Port Arthur bank took the letter of guaranty and directed the release of the goods by the Steamship Company, it rendered itself liable to the National Bank of Commerce and at the time the remittances of the amount sued on in this action were made the fact, according to the uncontradicted testimony, was that the Port Arthur bank had done the thing that rendered it liable to the defendant, and therefore at the time such payments were made the Port Arthur bank was under a legal as well as a moral obligation to pay the amount that it did pay to the National Bank of Commerce.

Can it be said, therefore, that the money was paid under a mistake of fact, if the Russo-Chinese Bank, by reason of its actions, had incurred an obligation to pay the amount to the National Bank of Commerce that it did pay in November and December, 1904? The control of the shipment of flour passed into the hands of the Port Arthur bank. It had the legal title and exercised acts of ownership over it, and the trial court correctly instructed the jury that a bailee or pledgee was under the duty to account to its principal for the goods that had passed into its possession and under its control, and the authorities which we have cited abundantly sustain this proposition.

The Port Arthur bank, not only by its acts of omission but by its affirmative act of commission, participated in the loss of the flour to the defendant. The entire subject matter covered by the bills of lading, through the acts of the plaintiff was absolutely lost and destroyed, so far as the defendant was concerned.

“After proof of loss of the subject of a bailment the burden is on the bailee to show that he used diligence regarding the same.”

*Hawkins v. Haynes*, 71 Ga., 40.

“When a bailee fails to return goods at the end of a bailment or account for their loss, the burden is upon him to satisfactorily show that it happened without legal negligence upon his part. This is equally true, whether by the nature of the bailment the bailee is bound to exercise ordinary care and diligence, or is liable only for gross neglect.”

*Donlan v. Clark*, 45 Pac., 1.

When personal property passes into the possession of or under the control of a bailee and proof of loss is shown, the burden is certainly upon the bailee to show what he did with it or to show that he exercised ordinary care and diligence in protecting it. Now the facts in this case show—and it is not contradicted—that the Port Arthur bank not only did not protect the shipment but in disregard of the instructions under which he received it from the defendant, it took over the flour itself and affirmatively consented that the same should be sold by

Clarkson & Company under the promise of Clarkson & Company to pay over to the Port Arthur bank the money realized from the sale thereof. We fail to see wherein the Court erred in instructing the jury as it did instruct it in this connection.

*Fifth and Sixth Instructions:*

What we have heretofore said in this argument seems to us to answer the objections to the fifth and sixth instructions, and we do not deem it necessary to discuss these instructions further.

*Seventh Instruction:*

The seventh instruction quoted by the plaintiff on page 256 of the record must be taken in connection with what follows in the instruction as given by the Court, found in paragraphs one and two on page 230 of the record, wherein the Court told the jury that the Centennial Mill Company had paid the original draft to the defendant, and that the National Bank of Commerce after such payment was acting as the agent of the Centennial Mill Company and that it had a right to act as such agent and to carry on all the business in its own name had a right to maintain an action in its own name, for the reason that the laws of the State of Washington authorized a bailee of an express trust to prosecute and defend actions in its own name, and the defendant, by

taking title to the flour and acting in its business was authorized to act in its own name clear through to the finish of the transaction, although it may now be acting in the interest of the Centennial Mill Company, the consignor of the flour, and the instruction was certainly not objectionable in view of the conditions imposed by the National Bank of Commerce in its letter of December 5th, 1904, wherein it acknowledged the receipt of the letter of November 9th, 1904. (Record p. 93). And besides, what possible injury could the plaintiff have sustained even though said instruction should be held by this Court to be erroneous? The jury found that the draft had been paid by Clarkson & Company at Port Arthur, and any other errors made by the Court in regard to the protest of the draft, or to any other branch of the subject, must be held to be entirely harmless.

#### SIXTEENTH ASSIGNMENT OF ERROR:

Under this assignment the plaintiff complains of the refusal of the Court to give certain instructions requested by the plaintiff. We think the trial court gave the substance of the instructions requested by the plaintiff, or as much thereof as the plaintiff was entitled to have given. The remaining instructions requested but not given by the Court, we think, were properly refused. We



shall at this time only notice a few of the instructions requested.

1. The first instruction asked for a directed verdict on the ground that there was no proof of payment of the original draft by Clarkson & Company to the Port Arthur bank. We have heretofore pointed out the evidence that we think abundantly supports the finding of the jury that the draft was in fact paid. But this instruction should have been refused for another reason, viz: The jury might have found that the draft had not been paid, and still the plaintiff would not have been entitled to a directed verdict, because the uncontradicted evidence of the witness Short disclosed that the Port Arthur bank had rendered itself liable for the value of the shipment by permitting Clarkson & Company to take over and sell the flour under a promise to account for the proceeds of the sale thereof to the Port Arthur bank. The instruction was properly refused.

2. The Court committed no error in refusing to give the third and fourth instructions requested by the plaintiff. Under the evidence in this case the plaintiff did not act with due diligence in handling the documents accompanying the draft. Even if the duty of the Port Arthur bank was to look after the documents alone, still it would not be absolved from liability under the facts in

this case, for the reason that it did not undertake to adhere to its limited duty, as claimed by the plaintiff, to look after the documents alone,—but it had the legal title to the goods and took them over, requiring Clarkson to recognize its ownership of the goods and acted as owner in disposing of them.

According to the testimony of Mr. Spencer, a witness called on behalf of the plaintiff, and the testimony of Mr. Davidson, the duty of the plaintiff bank at Port Arthur was not limited to caring for the documents but it was required to store and protect the shipment and we think the law as well as the custom imposed this duty upon the plaintiff. Being invested with all the muniments of title and having absolute control of the shipment and exercising that control, it certainly was required to so handle the shipment and the documents as a reasonably prudent person would handle them while acting in the capacity of agent for another,—the defendant in this case.

3. The sixth instruction requested fails to state the law correctly in the first place, and in the second place it is not applicable to the facts and circumstances in this case. A knowledge of the fact that Clarkson & Company were the agents of the Steamship Company on the part of the Port Arthur bank was brought out by the testimony and the evidence was uncontradicted that the Port

Arthur bank directed Clarkson & Company, as the agents of the Steamship Company, to turn the flour over to Clarkson & Company, Importers, for sale under an agreement on the part of Clarkson & Company to account for the proceeds of the sale to the Port Arthur bank.

The other instructions requested, we believe, were properly refused, and that we have shown sufficient reason for their refusal in our argument upon other branches of the case.

We believe that this Court will be convinced by an examination of the record in this case: That the Port Arthur bank received the draft in question from the National Bank of Commerce, accompanied by bills of lading that conferred upon the Port Arthur bank absolute power and control over the documents and the flour covered by the bills of lading; that it presented the draft for acceptance to Clarkson & Company; that the same was accepted by Clarkson & Company and that at the same time the Port Arthur bank had knowledge of the arrival of the shipment brought home to it; that the Port Arthur bank knew that Clarkson & Company were the agents of the Steamship Company; that it not only knew that Clarkson & Company were selling the flour covered by the shipment pledged to secure the draft; that the Port Arthur bank required Clarkson to enter into a

written agreement by which the ownership of the flour was recognized in the Port Arthur bank and required Clarkson & Company to account for the proceeds of the sale of the flour to the said bank

It must be taken as established that Clarkson & Company would not have sold the flour without the consent of the Port Arthur bank. The testimony of Mr. Short showed that he knew that the manager of Clarkson & Company would be sent to prison if he sold the flour without first obtaining permission from the bank to sell it. The testimony of the sole manager of the bank, Mr. Ofsiankin, was not taken by the plaintiff.

The finding of the jury that the draft had been paid by Clarkson & Company is abundantly supported by the testimony, and the fact must be apparent to this Court from an examination of the evidence in the case that the Russo-Chinese Bank was obligated to pay the National Bank of Commerce the amounts remitted to that bank in November and December, 1904, being the amount sued for in this action. The plaintiff has neither a legal or moral right to recover the money in question and the judgment of the lower Court should be affirmed.

Respectfully submitted,

E. S. McCORD,

J. A. KERR,

Attorneys for Defendant in Error.







IN THE

United States Circuit Court  
of Appeals

FOR THE  
NINTH CIRCUIT

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RUSSO-CHINESE BANK (a Corporation),

*Plaintiff in Error,*

VS.

NATIONAL BANK OF COM-  
MERCE OF SEATTLE, WASH-  
INGTON (a Corporation),

*Defendant in Error.*

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No. 2182.

SUPPLEMENTAL BRIEF FOR DEFENDANT  
IN ERROR

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Before the brief of the plaintiff in error was served upon us we had prepared our argument in support of the judgment rendered by the lower

court. Since receiving the brief of the plaintiff in error we feel that it is proper to make some reply to the argument of counsel upon a few propositions advanced by them in their brief.

Upon page 12 of their brief counsel contend that the court erred in instructing the jury that the Port Arthur bank became invested with the title and ownership of the flour. We have already in our former brief discussed this alleged error but we desire to make a few further observations upon it. Counsel contend that by the giving of this instruction the court undertook to determine the relative rights of the parties to this action, upon the theory that the relationship between them was one of vendor and vendee instead of principal and agent. We submit that the instruction quoted by counsel in their brief negatives this contention. The instruction expressly states that the Russo-Chinese Bank "became invested with the title and ownership of the flour as to all the world, *except the National Bank of Commerce of Seattle*, and had the legal right to sell and dispose of the flour and to receive the proceeds, subject to its duty as an agent to account to the National Bank of Commerce for it." This proposition of law was based

upon the provision of the statutes of Washington making a bill of lading properly endorsed and delivered a negotiable instrument, and making the delivery of the bill of lading the symbolical delivery of the flour. The court refers to the legal title to the flour but the entire instruction shows that the court recognized the relation existing between the banks as that of principal and agent, but stated to the jury that as to all the rest of the world the Russo-Chinese Bank was the owner of the bill of lading and the flour itself; and it was necessary for the court to give such instruction in view of the evidence and testimony that had been introduced in the case.

It was the contention of the plaintiff that the Steamship Company was liable for the loss of this flour, but the evidence showed that the bank, the holder of the legal title to the bill of lading and the flour, consented that the Steamship Company, through its agent, A. T. Short, deliver over the flour to Clarkson & Company, importers, for sale, under the promise of Clarkson & Company to account to the bank for the proceeds. The Steamship Company was perfectly justified in accepting the authority of the Russo-Chinese Bank to

release the flour, because only the holder of the bill of lading had the power to release the shipment. It seems to us that counsel have misinterpreted and misconstrued the purport and effect of the instruction of the court upon this question. The entire instruction must be read and construed together, and in the latter part of the instruction, on page 13 of counsel's brief, the court expressly stated that: "as agent for the owner it was obligated to account for the amount of the draft, to account for the security which the bill of lading constituted, and it cannot be excused from obligation to account by saying that the flour disappeared without its knowledge." And on page 14 of the brief, the court says:

"By virtue of these endorsements and transfers the *legal title* to the draft and documents and to the flour in question passed to and became vested in the Russo-Chinese Bank, and I instruct you that as a matter of law it was *in the power of* the plaintiff to handle, control, sell and dispose of such flour as its own."

The Russo-Chinese Bank was clothed with the legal title and all of the evidences of ownership and was in possession of the documents, and as against everybody except the National Bank of Commerce it had the power to handle the flour as

its own property, and had the power to direct the Steamship Company to release the flour to Clarkson & Company.

And in view of the fact that there was evidence introduced in the case showing that the bank had taken over the flour for itself, and had exercised acts of ownership over it and had caused it to be released by the Steamship Company, the instruction must be held to have been a proper exposition of the law as applied to the issues and the testimony in this case.

As between the National Bank of Commerce and the Russo-Chinese Bank the relationship of principal and agent continued to exist so far as the equitable title and the real ownership of the draft and the security was concerned, and we have no criticism to make of the language of the court in *Second National Bank v. Bank of Alma*, 138 S. W., 472, where the court said:

“By accepting for collection the draft accompanied by the bill of lading the plaintiff only became the agent of the Judge Machine Company for that purpose and it did not thereby become the true owner of the draft or of the machine which was covered by the bill of lading accompanying the draft.”

This is in effect what the trial court stated in

this case: that the relation of principal and agent existed between the two banks but that the legal title to the bill of lading and the flour was vested in the Russo-Chinese Bank.

In the same case the court says:

"The collecting bank had the right to sue in its own name for any default of the defendant by reason of which any liability was incurred by it to the Judge Machine Company, and it also had the right to institute suit against the defendant for any loss which it caused by reason of a breach of duty committed by it in collecting the draft because the title thereto had been actually transferred to it, although for collection, by the Judge Machine Company."

On pages 24 and 27 of their brief counsel cite the case of *National Bank v. Merchants Bank*, 91 U. S., 92, in support of their contention that collecting banks do not acquire title to documents, or to the property represented thereby, sent it for collection. The case only refers to the real ownership and not to the legal title,—and counsel seem to rely with great confidence upon the language of the Supreme Court in that case, and have requested this court to examine the opinion in that case with great care. We join in the request that the court consider the case of *National Bank v. Merchants Bank*, 91 U. S., 92, carefully.



In the case at bar the draft was drawn upon Clarkson & Company with documents attached to be delivered only upon payment; in that case it was a time draft drawn against a consignment to order "*for collection.*" In this case the draft was drawn with the documents attached to be delivered only *upon payment*. In that case the drafts were deposited in the bank for collection and there were no instructions by the forwarding bank as to what should be done with the drafts during the time intervening between acceptance of the drafts and the date of payment; and the court held that in the absence of specific instructions the collecting bank was justified in surrendering the bill of lading at the time the draft was accepted. The court in that case clearly indicates that if the bill of lading was not intended to be delivered up upon acceptance some words should have been used to indicate the agreement of the parties; that in the absence of such agreement the presumption controlled and it was the duty of the collecting bank to deliver the documents upon acceptance of the draft. But in the case at bar the Russo-Chinese Bank was expressly notified not to deliver the bill of lading or the flour until the draft was paid, and

the evidence showed and the jury found that the Russo-Chinese Bank did in effect deliver the documents and the flour by notifying the Steamship Company to turn over the flour to Clarkson & Company, importers, and by taking the letter of guaranty, and by requiring an agreement on the part of Clarkson & Company to account for the proceeds of the sale of the flour, and by consenting affirmatively to its sale. The distinction between the case cited and the case at bar is fundamental. The questions involved and all of the circumstances and surroundings were entirely different; and in the case of *National Bank v. Merchants Bank* the court further says, that the drawer of the draft and drawee could have made an agreement had they seen fit with reference to the transaction, and in the case at bar the agreement was made that the bill of lading and the flour were not to be delivered until payment.

And in *National Bank v. Merchants Bank* the court refers to a Massachusetts case, and says:

“In *Stollenwreck v. Thatcher*, 115 Mass., 224, there were instructions to the agent to deliver the bill of lading only *on payment* of the draft, and it was held that the special agent thus instructed could not bind his principal by a delivery of the bill without such payment. Nothing was decided that is pertinent to the present case.”

And in the case of *Wisconsin Bank v. Bank of British North America*, 21 Upper Canada Queen's Bench Reports, 284, the draft was sent to a collecting bank "for collection" and there were no instructions to hold the documents until the draft was paid.

Counsel also cite the case of *Gregg v. Bank of Columbia*, 52 S. E. 195, in which the court said:

"The Chicago owner of the corn had to the drafts and bills of lading invested the Bank of Columbia with legal authority to offer the corn to Miot, whether as purchaser or as agent of the plaintiff is not material. But when he refused to take it the authority of the bank was at an end, and it had no more right to sell the flour to another than if it had never had the drafts."

This language only refers to the ownership existing between the drawer and the Bank of Columbia. The case does not undertake to hold that the purchaser of the corn would not be protected in buying the same from the Bank of Columbia, which was invested with the legal title, and the court held that the Bank of Columbia in selling the corn to a third party was liable to the real owner for the highest market value thereof.

So in this case, the Russo-Chinese Bank, as the trial court correctly stated, had the power to sell the flour or dispose of it, or handle it in any

way that an owner might handle it. It had the power to direct the Steamship Company to release it and to direct Clarkson & Company to take it over and sell it and account to it for the proceeds of the sale; but by doing so it converted the flour to its own use, made it its own property and rendered itself liable for the value thereof at the highest market price to the National Bank of Commerce, and the conversion took place when the Russo-Chinese Bank gave Clarkson & Company permission to sell it and authorized the Steamship Company to deliver it to Clarkson & Company. And the value of the flour is shown by the testimony to have been considerably more than the amount of the draft, and under the authority of the case of *Gregg v. Bank of Columbia* the National Bank of Commerce would have been entitled, had it seen fit to do so, to hold the Russo-Chinese Bank accountable for the value of the flour at the highest market price, if that value exceeded the amount of the draft, and the testimony conclusively shows that it did. And the evidence showing that the Russo-Chinese Bank had converted this flour to its own use and that it was of a greater value than the amount of the draft, how can it be said with

any degree of fairness that the Russo-Chinese Bank was not indebted to the National Bank of Commerce for the amount of the remittances made in November and December, 1904, the recovery of which is sought in this action?

If we are correct in this view, and we think the authorities cited by counsel for plaintiff clearly support it, then it is manifest that any errors that might have been committed by the trial court as to the duty of the Russo-Chinese Bank to insure, store and guard the flour become wholly immaterial and harmless, and it is wholly immaterial whether the flour was insured or stored, in the light of the fact found by the jury that the Russo-Chinese Bank did take over the flour, and did by its affirmative actions allow it to be appropriated by Clarkson & Company under their promise to account for the proceeds of its sale.

Counsel contend that the sole duty of the Russo-Chinese Bank was to present the draft for acceptance and when accepted to hold the documents, and do nothing else in connection with the matter until the day of payment. And, for the sake of argument, assuming that this is the law, it is wholly inapplicable to the facts and circum-

stances surrounding this case. The Russo-Chinese Bank was not content to hold the documents in the manner that counsel for plaintiff assert that it should have held them between the day of acceptance of the draft and the day of payment; but it undertook to act as the owner of the flour, exercised dominion over it and consented that Clarkson & Company take the flour and sell it, and consented to the Steamship Company releasing it to Clarkson & Company. In all good conscience can it be seriously contended that a collecting bank has fulfilled its whole duty as a collecting agent, by simply holding the documents in its physical possession while taking such action as operates to release the goods covered by the documents to a third party, in violation of instructions not to deliver the documents and the goods represented by them until the draft had been fully paid? It would be unconscionable and monstrous to permit a collecting bank to so manipulate and handle the security by its affirmative act as to deprive the forwarding bank of the proceeds thereof; and the jury doubtless found that the testimony of Mr. Short, to the effect that the letter of guaranty so frequently referred to by us, was actually



taken by the Russo-Chinese Bank and the flour released by its affirmative act. And in view of the testimony the alleged errors of the court, if any, as to the duty of the Russo-Chinese Bank, or any collecting bank, in handling the documents or the goods between the date of acceptance and the date of payment become wholly immaterial and harmless.

On page 40 and subsequent pages of their brief counsel for plaintiff contend that the court erred in refusing to instruct the jury that the draft on Clarkson had not been paid. In our former brief we pointed out the evidence tending to show payment. There was unquestionably a conflict of testimony upon this point, but it is the function of the jury to pass upon controverted questions of fact and conflicting evidence, and this court will not undertake to determine or pass upon the weight of the testimony.

Moreover, we contend that the burden of proof was upon the plaintiff to establish that the draft had not been paid and it is within the province of the jury to have disbelieved the testimony of the plaintiff's witnesses as to the non-payment, even though such evidence was contradicted.

"But it seems to us that if we concede that if appellant's witnesses did testify to facts sufficient to show that Veratt was an independent contractor, and that there is nothing on the face of the record that directly contradicts him, it still would be going too far for this court to reverse the cause and direct a judgment in favor of the appellant.

"There still remains the question of the credibility of the witness. This was a question peculiarly within the province of the lower court and the jury to determine. They could observe his conduct upon the witness stand, his apparent frankness or lack of frankness, and his demeanor generally. These matters are not depicted in the record and this court is without opportunity to know how far the witness's credibility was affected by them. When, therefore, the trial judge and the jury both find that his evidence was not sufficient to overcome the case made by the respondent, this court ought not to interfere with their finding."

*Johnson v. Great Northern Lumber Co.*, 48 Wash., 325.

On page 46 of brief of counsel for plaintiff it is contended that there is no evidence of any neglect on the part of the Port Arthur branch, and upon page 48 of their brief counsel say:

"It will be admitted at once that the Port Arthur branch did not have the right to deliver these bills of lading or permit the Steamship Company to discharge the flour without the surrender of the bills of lading. Such a step would have

been in direct violation of the letter of instructions sent by the Seattle bank. In this connection it becomes necessary to examine somewhat narrowly the procedure which it is claimed by the witness Short he was authorized by the bank to take."

When this court reads the testimony of Mr. Short, we think it will be impressed by the eminent fairness of the witness and will reach the same conclusion that the jury did as to the truth of his statement in regard to the letter of guaranty and the consent on the part of the bank to Clarkson, and the taking over of the flour and selling it by Clarkson under a promise to account to the Russo-Chinese Bank for the proceeds of the sale thereof; but even though this court should reach a contrary conclusion, still it is necessarily bound by the finding of the jury as to the credibility to be attached to the testimony of Mr. Short. There is no question as to Mr. Short clearly testifying to the action of the Russo-Chinese Bank in directing the Steamship Company to release the flour and in taking the letter of guaranty which compelled Clarkson & Company to recognize the ownership of the flour in the Russo-Chinese Bank, which acts counsel admit in the quotation from their brief

above set forth, were in violation of the instructions given by the Seattle bank to the Port Arthur branch in regard to the handling of the shipment.

The errors discussed by counsel as to the admissibility of testimony we think we have sufficiently covered in our former brief.

But even assuming that all of the testimony with regard to custom and usage was erroneous, the court must find, in view of the special finding of the jury as to the payment of the draft that such errors were wholly immaterial. For if the draft was in fact paid, or if the jury found that there was not sufficient evidence to show that it was not paid by Clarkson & Company, then what possible materiality can there be in contending that the court erred in admitting or rejecting testimony as to custom or usage?

On pages 56 and 57 of their brief counsel for plaintiff refer to the testimony of Davidson, and contend that Davidson was not referring to the flour shipped on the Steamship "Hyades" but was referring to the flour later shipped on the Steamship "Pleiades."

It is true that Davidson was somewhat con-

fused as to what vessel brought the shipment securing the draft in question, but he stated that he did not know whether it was the "Hyades" or the "Pleiades" but that he referred to the vessel that arrived at Port Arthur about February 9th. He also stated in his testimony that it had been seven or eight years since the transaction occurred and that he was not sure as to the vessel.

But Davidson was clearly referring—and his testimony shows it—to the vessel that brought the flour securing the draft in controversy. Moreover, the evidence of Mr. Short clears the matter up conclusively. Short testified that there were only 6000 to 8000 sacks of flour in Clarkson's warehouse on the arrival of the "Hyades" containing about 36,000 sacks. The "Pleiades," according to Short's testimony arrived at Port Arthur about the 9th of February and only unloaded about 1500 sacks. The balance of the flour on the "Pleiades" was taken away from Port Arthur to Che-foo and there unloaded. Short left Port Arthur on the "Pleiades" when she sailed shortly after the 9th of February, and it is clear that Davidson could not have had in mind the Steamship "Pleiades"

but did have in mind the "Hyades" which was the vessel that brought the flour that is now in controversy. Moreover, Davidson's testimony is to the effect that the flour that came on the vessel he had in mind was sold in part by him to Ginsburg—or that he agreed to sell the same to Ginsburg. It seems to us that the attempt to discredit Davidson's testimony by this confusion of the two steamers or by his mistake as to a date is altogether trivial and unworthy of consideration by this court, especially in view of the fact that the jury heard the testimony and by their verdict show that they did not discredit Davidson's testimony.

Paragraph 2 of said page 60 predicates an error upon the refusal of the court to give an instruction that the Seattle bank was entitled to recover only the actual damages suffered by reason of negligence, and contend that the instruction requested was pertinent with reference to the permission given Short by the manager of the bank to take over the flour and further contend that there was no showing that any action was ever taken under the permission and no flour ever disposed of under it.

We can hardly understand the purport of the



contention of counsel in view of the evidence. The uncontradicted testimony shows that flour was worth about two and one-half roubles per sack and that by reason of the consent given Clarkson & Company to take over and sell the flour, the flour which was held as security for the draft in question disappeared and the evidence shows that this flour, or a considerable part of it, was sold to Ginsburg; that the Port Arthur bank knew of the selling to Ginsburg, succeeded in diverting the sale made by Davidson to Ginsburg; co-operated with Clarkson in selling the flour to Ginsburg at an increased price and that the proceeds of the flour sold to Ginsburg, to the extent of 67,000 roubles, were actually received by the Port Arthur bank. Manifestly Clarkson & Company would not have sold the flour without the permission of the bank and the damage and injury of the Seattle bank clearly resulted from this permission so given and from the affirmative action of the Port Arthur bank.

We fail to see how it can be seriously contended that there was no proof of acting by Clarkson & Company under the letter of guaranty and the permission given them to take over the flour from the Steamship Company.

On page 61 of the brief for plaintiff in error counsel complain of the refusal of the court to give the instruction requested, to the effect that there was no necessity on the part of the Port Arthur bank to notify the defendant that Clarkson & Company were the agents of the Steamship Company, if the Centennial Mill Company, or its representative, already knew that fact.

Such instruction was wholly immaterial and was in no way pertinent to the facts in the case. Whether the Centennial Mill Company knew that Clarkson was the agent of the Steamship Company or not, it had the right to assume that the Steamship Company would fulfill its duty and hold the flour in accordance with the terms of the bills of lading. But the uncontradicted testimony shows—or at least the testimony of Mr. Short shows—that the Port Arthur bank affirmatively consented to the action of the Steamship Company in surrendering the flour at a time when the Port Arthur bank was invested with the legal title to the bills of lading and had such bills of lading in its custody and possession.

On pages 61, 62 and 63 of the brief of counsel for the plaintiff in error it is contended that

owing to the fact that the Centennial Mill Company had paid to the National Bank of Commerce the amount of the original draft and that the National Bank of Commerce, when it received the remittance sued for in this action in November and December, 1904, paid the same over to the Mill Company, the National Bank of Commerce was in no way interested in the transaction and could not defend the action brought against it for the recovery of this money. It is further contended that the Centennial Mill Company is the real party in interest and that if anyone has a claim against the Port Arthur bank it is the Centennial Mill Company and not the National Bank of Commerce.

In making this contention counsel must have overlooked Section 180 of 1 Bal. & Rem. Code, which is as follows:

“An executor or administrator or guardian of a minor or person of unsound mind, a trustee of an express trust, or a person authorized by statute, may sue without joining the person for whose benefit the suit is prosecuted. A trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom or in whose name a contract is made for the benefit of another.”

The Centennial Mill Company vested in the National Bank of Commerce the legal title to the draft, the documents and the shipment itself and it undertook to carry out the business of the Mill Company in the collection of the draft and in the handling of the entire transaction. It was acting as a trustee or agent for the Mill Company, and under the statute it seems to us to be the only person who could have maintained an action for the damages in question.

It is possible, as the National Bank of Commerce was acting as the trustee or agent of the Centennial Mill Company, that any defense the Port Arthur bank might have had against the Mill Company could have been asserted against the National Bank of Commerce. But there is no such question involved in this controversy. If this be true, then the converse ought to follow—that the National Bank of Commerce, acting for the Centennial Mill Company, ought to be permitted to set up any defense against the Port Arthur bank which the Mill Company might have interposed. In fact the case of *Second National Bank v. Bank of Alma*, 138 S. W., 474, cited by counsel for the plaintiff in effect upholds the right of the

defendant to interpose any defense that was available to the Mill Company.

The real beneficial owner of the flour was of course the Centennial Mill Company. The National Bank of Commerce was its agent. The Seattle bank undertook to handle the shipment as the agent of the Centennial Mill Company. The fact that the Mill Company could not proceed against the Seattle bank for the negligence of the Port Arthur bank affords no reason for holding that the Seattle bank, the agent of the Mill Company, cannot avail itself of the defense of negligence on the part of the Port Arthur bank in protecting the interests of the Mill Company. The trustee of an express trust ought to be permitted to avail itself of any defenses that are available to the beneficiaries under the trust.

Assuming that the draft for \$36,194.80 was in fact paid by Clarkson & Comany to the Port Arthur bank and that it has wrongfully retained such money, and had it in its possession at the time the remittances were made by it to the Seattle bank in November and December, 1904, even under such circumstances, if counsel's contention is correct, the National Bank of Commerce could not

interpose such defense, because—as counsel say—the Centennial Mill Company had relieved the National Bank of Commerce of liability for the wrongful or negligent acts of the Port Arthur branch. Such a holding by this court would seem to be most unconscionable and unreasonable.

We fail to see upon what principle of law or fair dealing the defendant should be required to refund the money in controversy to the plaintiff and then sue the Mill Company to recover it back, when it manifestly appears, as the lower court instructed the jury, that the National Bank of Commerce was acting as the agent or trustee of an express trust of which the Centennial Mill Company was the beneficiary.

“A trustee may set up in his character as trustee any defense which the *cestuis que trustent*, were they in person defending the action might urge in their own behalf.”

39 Cyc., 450.

*Wagnon v. Pease*, 30 S. E., 895.

Respectfully submitted,

KERR & McCORD,

*Attorneys for Defendant in Error.*



No. 2182

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

RUSSO-CHINESE BANK (a corporation),  
*Plaintiff in Error,*

VS.

THE NATIONAL BANK OF COMMERCE  
OF SEATTLE, WASHINGTON,  
*Defendant in Error.*

## PETITION FOR REHEARING.

*To the Honorable William B. Gilbert, Presiding  
Judge, and the Associate Judges of the United  
States Circuit Court of Appeals for the Ninth  
Circuit:*

Plaintiff in error respectfully requests a rehearing in this case.

This court, in its opinion affirming the judgment, has discussed but a single phase of the case. It has concluded "that the special verdict of the jury finding that the Port Arthur branch of the Russo-Chinese Bank did receive payment of the draft dated December 11, 1903" is conclusive, and that

there is at least some evidence to support such verdict.

In our brief, we had more particularly discussed the instructions given by the trial court concerning the obligations and relations of the Port Arthur branch to the consignment of flour, for the reason that it seemed that these instructions were fundamental and necessarily must control any verdict, whether general or special, of the jury; and that if correct, they were tantamount to a direction to find for the defendant; and that if incorrect, they must necessarily result in a reversal because upon a subject matter necessarily and directly germane to the relations between the parties and of necessity underlying and controlling any verdict that might be rendered upon the facts.

For this reason we now take the liberty of first referring more at length to the testimony which may or may not support this special verdict, and shall next urge that certain instructions of the court, if erroneous, must necessitate a reversal, notwithstanding the special verdict.

## I.

**WE STILL URGE THAT THERE IS NO LEGITIMATE EVIDENCE THAT THE DRAFT IN QUESTION HAS EVER BEEN PAID IN WHOLE OR IN PART. UPON THE CONTRARY, THAT THE EVIDENCE IS CLEAR AND CONCLUSIVE THAT IT HAS NEVER BEEN PAID.**

We first give a copy of the first portion of the court's opinion on this subject to the end that the

court may consider it in detail with more visual convenience.

“We find in the evidence of the defendant’s witnesses Davidson and Short, and in that of Clarkson, as well as in the circumstances of the case, much evidence upon which the special verdict might well have been based. The record shows that there had been many other similar drafts, accompanied by similar documents, sent by the Seattle bank to the Port Arthur bank for flour sold by the Centennial Mill Company, and that the plaintiff bank was familiar with the business of Clarkson & Co., and, indeed, was mainly instrumental in the establishment of that firm at Port Arthur. Clarkson & Co. also had a place of business at Vladivostok, where its main office was—Davidson during most of the times in question being its manager at Port Arthur, and Short its assistant manager there, a Mr. Ofsiankin being during all of the times in question the manager of the plaintiff bank at Port Arthur, and subsequently, and at the time of the taking of the testimony in this case, being the manager of the Vladivostok branch of the plaintiff in error. The record shows that Clarkson & Co. were the agents of the steamship company that carried the flour in question from Seattle to Port Arthur and were also importers, merchants, and insurance agents, and had one of the three warehouses at Port Arthur, all of which facts were well known to the Port Arthur bank. The flour in question was carried to Port Arthur by the ship Hyades, which reached there about the middle of January, 1904. The evidence also shows that Clarkson & Co. were large customers of the bank. The succeeding ship of the steamship company, also carrying flour among other things, reached Port Arthur about the 7th of Feb-

ruary, 1904. Short testified, among other things, that when the Hyades arrived with the 35,312 quarter-sacks of flour in question, there were but from six to eight thousand sacks in Clarkson & Co.'s warehouse, and that when that shipment arrived he went to the Port Arthur bank on behalf of Clarkson & Co. to accept the draft drawn for the purchase price of it, and did so; that when he accepted the draft Mr. Ofsiankin, on behalf of the bank, authorized Clarkson & Co. to take immediate possession of the flour and sell it, and that he, Short, on behalf of that firm, gave the bank what he designates as a 'letter of guaranty' and what Davidson in his deposition designates as one of 'hypothecation', recognizing the flour as the property of the bank until paid for and agreeing to pay over to the bank the proceeds thereof until full payment was made; that the letter was 'the regular form of bank guaranty; it was a printed form', said the witness. And both Short and Davidson testified that what was done in the matter of the shipment here in question was in accordance with a long-established custom between the Port Arthur bank and Clarkson & Co.—Short testifying that 'from the year 1900 the same rule existed. We always gave the bank a letter of guaranty against—a letter of guaranty to take delivery of the cargo and the cargo belonged to them until it was paid for, and we sold it out and deposited the money in the bank from time to time as Clarkson & Co. got it in'. Davidson in his deposition corroborates the testimony of Short in that regard, and it is a most significant circumstance that although it appears from the evidence that during the times it was being taken Mr. Ofsiankin was the manager of the plaintiff in error's bank at Vladivostok he was not called to contradict the testimony of Short and Davidson; nor did the plaintiff in

error produce the written agreement between the parties delivered to the bank according to the testimony of those witnesses, nor in any way account for it. Short testified that upon the acceptance by Clarkson & Co. of the draft in question and the delivery by that firm to the Port Arthur bank of the documents mentioned, *Clarkson & Co. took possession of the 35,312 quarter-sacks of flour and that they thereupon commenced selling it and paying into the bank the proceeds thereof is a fair inference from his testimony as well as that of Davidson.*"

We have italicized the concluding portion of this opinion as more particularly the portion thereof which comments upon testimony tending to show that, in the language of the special verdict, the Port Arthur branch did receive payment of the draft dated December 11, 1903, on account of which the plaintiff made the remittance to the defendant alleged in the complaint.

Examining now the foregoing statement more in detail, it is first said that many other similar drafts, accompanied by similar documents, had been sent by the Seattle bank to the Port Arthur bank, and that the plaintiff bank was familiar with the business of Clarkson & Co.; that Clarkson & Co. had its main office in Vladivostok and were large customers of the plaintiff bank.

Assuming the truth of these statements, they cannot show of themselves that this particular draft was paid to the Port Arthur branch. We may assume that many other similar drafts had been han-

dled by the parties; that Clarkson & Co. were the agents of the steamship company; and that that fact was known to the Port Arthur branch (although this latter fact is positively denied by the bank's officials). Yet, nevertheless, there is in none of these facts *alone* anything upon which the special verdict could be predicated or upheld.

The testimony of Short is then mentioned that when he accepted the draft, Ofsiankin, on behalf of the bank, authorized Clarkson & Co. to take immediate possession of the flour and sell it, and that a letter of guaranty was given in accordance with the usual custom.

But we fail to find in this evidence, assuming its truth, anything to show that the draft was paid. Assuming that the bank did make the somewhat extraordinary arrangement of permitting Clarkson & Co. to take the flour without payment of the draft, such action would, without doubt, have been negligence on the part of the bank, for the consequences of which it would be responsible. But it would not have been a *payment* of this particular draft and cannot of itself make possible this special verdict of the jury.

We now in this connection, for the first time, draw this court's attention to another instruction given by the trial court as follows (p. 256):

"If you find from the evidence in this case that plaintiff permitted Clarkson Company to take over the flour under such an arrangement as the defendant claims with the stipulation



that the plaintiff was the owner of the flour and with the agreement that Clarkson & Company would account to the plaintiff for the proceeds of the sale of the flour, then I instruct you that such action on the part of the plaintiff constitutes in law a payment of the draft in question and the plaintiff cannot recover and your verdict must be for the defendant."

This instruction was specifically and fully excepted to:

"We except to the instruction to the effect that if plaintiff permitted Clarkson & Company to take over the flour under an arrangement between the plaintiff and Clarkson & Company which would recognize by Clarkson & Company the ownership of the flour by the plaintiff and the right of Clarkson & Company to sell the flour, that by such agreement and action on the part of the plaintiff there became in law a payment of the draft in question and that the plaintiff cannot recover, and we except to each and every part of said instruction, which is numbered 11 of defendant's proposed instructions" (pp. 232-8).

And also to the refusal of the court to give the following instruction:

"If you shall believe that the Russo-Chinese Bank was negligent in any respect in regard to its duties in the premises, then I charge you that it is liable, if at all, only for such actual damages as were directly suffered by the Seattle Bank by reason of such negligence. That is, even if you believe that it was the duty of the plaintiff to insure and store this flour and take it out of the control of Clarkson & Company, but that nevertheless if plaintiff

had done these things, the flour would have been lost or destroyed by reason of the war conditions at Port Arthur, then I instruct you that such negligence cannot be considered by you, but that plaintiff is entitled to recover regardless of such negligence" (p. 217).

This instruction of the trial court would seem to conclusively demonstrate that the special verdict of the jury cannot be divorced from the instructions of the court, but that the two are inseparably intermingled and must be read together; so that if the instructions are erroneous, the special verdict must fall. For by these instructions the jury were told that if plaintiff gave Clarkson & Co. permission to take over the flour, that such act alone constituted a *payment of the draft*.

If these arrangements were made by the bank, it would have been in violation of their instructions, and they would have been liable to the Seattle bank for the consequences of such act, but it does by no means follow that such act would as a matter of law have been a *payment of the draft*, because although the arrangements were made it might follow that none of this flour was actually sold, but that it remained in the warehouse, and, therefore, that the Seattle bank had not actually suffered any damages by reason of such negligence on the part of the Port Arthur branch. It is submitted that the instruction requested and refused, to the effect that the Russo-Chinese Bank if negligent was only liable for such actual damages as were suffered by reason of such negligence, is the un-

doubted law. Yet by the instructions given the jury were told that by this single act of negligence the Russo-Chinese Bank was at once liable for the full amount of the draft, because the jury were instructed to consider such negligent act as a payment in full. We discuss this instruction more fully hereafter.

We shall endeavor to show to this court that there is not any evidence that this flour was ever sold by Clarkson & Co. or that the Russo-Chinese Bank ever received any money for it. Assume that it had been admitted that the Russo-Chinese Bank had made this arrangement, could it have been held liable in any greater damages for such negligent act than were actually suffered by its correspondent? Yet to support these instructions of the court it must be held that immediately upon making such unauthorized arrangement, the Russo-Chinese Bank became at once responsible to the Seattle Bank for the full amount of the draft, although it might happen that the arrangement was never consummated; no flour removed from the warehouse by Clarkson & Co.; and not a dollar received by the Russo-Chinese Bank therefor.

In reviewing the preceding excerpt from the court's opinion, we have now endeavored to show that the evidence referred to up to the sentence given in italics was not sufficient, even by way of inference, to justify this special verdict. It is not stated in the opinion, nor is it claimed by

counsel for defendant in error, that there is any direct testimony that this draft was ever paid in money in whole or in part. The only argument is one of inference. It is said that there was a long-established custom by which a letter of guaranty was given, and from that inference the conclusion is reached that this particular draft was paid.

We urge that all this testimony, concerning the established custom, to be of any effect whatever, must at least be connected and identified with the particular draft in question.

When this evidence concerning the custom existing between the parties was offered, the plaintiff below made strenuous objection upon the ground that it was not shown that the custom applied to a case similar to the present one.

Thus when this question first arose in the deposition of Davidson, the following objections were made (p. 177):

“Q. What is the custom of bankers with reference to presenting drafts for acceptance?

“COUNSEL FOR PLAINTIFF. Now, may it please the court, we desire to object to that question as incompetent, irrelevant and immaterial, upon two grounds: First, that there is no reason for the court to now invoke any custom or usage, because the contract in this case is clear and specific and direct; in other words, there is no necessity for an implied contract, because there is an express one; and upon the second ground that the question does not refer to the conditions prevailing in this case, because it does not ask with reference to presenting drafts

for acceptance which are sent as against payment, but it asks generally as to drafts for acceptance. Now, of course there may be one custom of bankers concerning one sort of a draft and another concerning the other kind of a draft, but to invoke now a custom generally and say that it applies to this case is, we submit, utterly incompetent, irrelevant and immaterial."

This objection was overruled and exception allowed.

The following question was then asked:

"Q. What is the established custom among bankers at Oriental ports with reference to the handling of drafts with bills of lading and documents attached, when the drafts are in their hands for collection?

"COUNSEL FOR PLAINTIFF. Your Honor will allow me the same objection as that made to the previous one, and the third point that it is not pleaded in the pleadings."

This objection being overruled, and exception allowed, the witness answered:

"A. The established custom among bankers in the Orient is not to part with the documents until the drafts have been paid, if the documents are only deliverable against payment. It often happens, however, that the firm upon which the draft is drawn has a good credit with the bank and under those circumstances the bank delivers the documents against acceptance and thereby accepts responsibility."

A motion to strike out that portion of the foregoing answer beginning with the words, "It often

happens" being denied, the next question was (p. 179):

"Q. What is the custom of the Russo-Chinese Bank upon the arrival of shipments where drafts with bills of lading are attached are in their hands for collection?"

to which the following objection was made by counsel for plaintiff (p. 179):

"COUNSEL FOR PLAINTIFF. We object to any evidence of this custom on the grounds previously stated and upon the further ground that there is no pleading whatever here concerning this matter, therefore it is incompetent, irrelevant and immaterial. There is no statement in the question as to the character of the draft referred to, whether it was a draft as against acceptance or whether it was a draft as against payment. For example, the question is this, Your Honor: 'What is the custom of the Russo-Chinese Bank upon the arrival of shipments where drafts with bills of lading are attached are in their hands for collection'? Now there are two kinds of drafts. One is a draft which authorizes them to turn the bill of lading over when it is accepted; that is one thing. The other is where the draft says they shall retain the bills of lading until it is paid; that is another thing. But now this question is asked and the answer is made as if it were a general statement."

This objection being overruled, the witness answered (p. 180):

"A. The custom of the Russo-Chinese Bank at Port Arthur was to see that the cargo was stored and insured and the managers of the Russo-Chinese Bank have frequently come to the office of Clarkson & Company to ascertain



if certain cargo was properly stored and have taken out fire insurance with some of the fire insurance companies for which Clarkson & Company acted as agents, on such cargo.”

The witness subsequently testified at length that it was the bank’s custom to deliver the bills of lading to Clarkson & Co. when the draft was *accepted*. We submit that the foregoing objections and exceptions clearly placed before the court the position of the plaintiff below, which was that before any evidence concerning the delivery of bills of lading of the cargoes in other cases was given, it must have been shown that the witness was testifying to drafts accompanied by documents deliverable against *payment*, and not against acceptance; that in the absence of this fundamental ground of similarity the evidence should not have been admitted.

The rulings and this evidence becomes of especial significance because of the position taken by this court in its opinion. It largely finds support for the special verdict from the custom that had prevailed in previous cases. The jury could not know from Davidson’s testimony that this custom was followed when the bank received drafts with instructions to hold the documents against payment.

It is said by the court that “Davidson in his deposition corroborates the testimony of Short” as to the giving of the letter of guaranty. But there is a difference in the testimony of these two witnesses, a difference to which the attention

of the two witnesses was drawn so clearly that it cannot admit of doubt. Davidson testified that the custom was for the Russo-Chinese Bank to deliver the bills of lading to Clarkson & Co. when the draft was *accepted*. He testified upon direct examination (p. 183):

“Q. When Clarkson & Company were allowed to take delivery of the cargo under the circumstances you have described, who held the bills of lading?

“A. The custom was for the bank, the Russo-Chinese Bank, to deliver the bills of lading to Clarkson & Company when Clarkson & Company accepted the draft.

“Q. For how long was this practice kept up?

“A. This custom was in practice from the time I took charge of the firm of Clarkson & Company in Port Arthur until I left.”

And upon cross-examination he testified (p. 209):

“Q. If, in answer to the direct interrogatories, you have stated that Clarkson & Company were allowed to take delivery of cargoes without production of the bill of lading, state if, in each case payment had not first been made to the Russo-Chinese Bank for the goods, and also state whether or not such custom prevailed only as related to bills of lading which the Russo-Chinese Bank has sent to Harbin for safe-keeping?

“A. I have not stated that Clarkson & Company were allowed to take delivery of cargoes without production of the bill of lading.”

Now we know positively in the present case that the bills of lading were not delivered to Clarkson & Co., or anyone else, by the Port Arthur

branch, for the reason that they were produced in court by the plaintiff, and are now in the files of that court; so that the custom or practice to which Davidson testified could not have been followed in the present case.

Short testified (p. 141):

“Q. Well, when was this letter of guaranty, containing the provisions that you have named, executed with reference to the acceptance?

“A. At the time of the acceptance of the draft.

“Q. What became of the documents?

“A. The documents were left at the bank. Oftentimes we took the documents; others we left them there.

“Q. What did you do in this case?

“A. They were left there.”

We find, therefore, that instead of there being corroboration there is contrariety of opinion between these two witnesses as to the custom that existed.

It is next said in the opinion that it is a significant circumstance that Mr. Ofsiankin was not called to contradict the testimony of Short and Davidson. To this our only reply can be that this trial took place in Seattle, and that Mr. Ofsiankin was in Vladivostok (p. 172); that there was nothing in the pleadings in this case to put the plaintiff upon notice that any such custom, testified to by either Short or Davidson, was to be relied upon. To the contrary, the only usages pleaded in the amended answer are (p. 13): (1) That under the custom

among bankers at Oriental ports, it became the duty of the plaintiff to present said draft for acceptance upon its arrival, and (2) that under the custom of bankers, it became the duty of the plaintiff to look after, protect and care for the flour.

There was, therefore, nothing in the pleadings to the effect that defendant would rely upon a custom or usage prevailing between Clarkson & Co. and the Port Arthur branch by which Clarkson was permitted to have possession of flour upon giving a letter of guaranty and, as noted, plaintiff upon the introduction of this testimony made objection upon this specific ground. The absence of Ofsiankin at the trial was, of course, plaintiff's misfortune, but in the absence of any such pleading or other showing from the defendant, the failure to call him as a witness to contradict the testimony of Short and Davidson should not, we submit under the circumstances, be held as an admission on the part of the plaintiff that this testimony is true.

Comment is also made that the plaintiff did not produce the written agreement of guaranty claimed to have been delivered to the Russo-Chinese Bank. The plaintiff has denied that it ever received any such document. Thus Friedberg testified (p. 33):

“Neither the bank at Port Arthur nor myself ever obtained possession of the shipment of flour. Nor did the bank at Port Arthur take this flour into custody or control or sell it to the Russian Government, or to one Gins-

burg, a representative of the Russian Government. Nor did I or the Russo-Chinese Bank at Port Arthur surrender the draft or the documents attached thereto to the agent of the Steamship Co. These documents are in the possession of the Russo-Chinese Bank up to this date. The bank never got possession of the flour and never transferred it to Ginsburg. The bank never realized any sum from Ginsburg for this flour; never sold or delivered it to Ginsburg; nor do its books show any entries regarding such sale."

The witness Bock testified (p. 68) that the bank at St. Petersburg had had correspondence with the National Bank of Commerce in regard to the draft transaction, and he said that he annexed "all the letters and telegrams received by the bank at St. Petersburg from the National Bank of Commerce of Seattle and the copies of the replies". This so-called guaranty is not one of them. (We do not find that there is any specific question in the record calling for all the correspondence between Clarkson & Co. and the bank.) At the trial, plaintiff's counsel stated (p. 140) that plaintiff did not have this document.

Bearing upon the failure of the plaintiff to produce this so-called letter of guaranty or the witness Ofsiankin at the trial, reference should be made to the deposition of the witness Clarkson (pp. 109-118). This deposition was taken long before the first trial and read at the first trial. Clarkson was then engaged in litigation with the Russo-Chinese Bank and not a friendly witness;

and in this deposition he not only states nothing concerning these so-called letters of guaranty, but on the contrary denies that any such custom existed between his firm and the Russo-Chinese Bank. He also stated (p. 111) that all the books and documents pertaining to the Port Arthur office were lost during the siege of Port Arthur. Concerning the method of doing business by Clarkson & Co. at Port Arthur he said (p. 110):

“When a steamer was unloaded by ourselves boat notes were given to the steamer and the goods held at the warehouse until parties presented the bills of lading when the goods were turned over to them after all charges to date had been paid.”

and at page 113:

“Clarkson & Co. always either paid the drafts before taking delivery of the flour as merchants or else made arrangements with the bank by which the bank would turn over the documents to us.”

At the time of the second trial, therefore, we submit that it could hardly be considered negligence on the part of the plaintiff in failing to have Of-siankin present because it already had the depositions of the men who had this draft transaction particularly in charge at Port Arthur, and who were familiar with and produced the books of the bank. There was, also on file, as noted, a direct statement from Clarkson, who certainly must have been as familiar with the method of transacting his own business as anyone else, to the effect that



he never permitted cargoes to be released from the possession of the steamship company without the production of the bills of lading; that plaintiff had these bills of lading and, naturally, was justified in believing that the flour had not been delivered.

If any presumption is to be indulged for the non-production of this document or a copy, it would seem that the consequences militate against the defendant and not the plaintiff, for it will be noted that counsel for defendant stated at the trial that he had demanded the *original* over a year before, and knew that plaintiff would not produce it because it denied its existence. Nevertheless, no copy was produced, nor were the witnesses Short and Davidson able to give anything more than the baldest description of the document. The plaintiff did produce the bills of lading. The presumption, therefore, was that the bank had not permitted the flour to be taken over by Clarkson without payment. We submit that the plaintiff was entitled to rely upon such a presumption, and that it was the business of the defendant, if it claimed that this letter of guaranty existed, to produce a copy thereof, and if a copy of this particular letter was not obtainable, then the original or copies of some of the other letters which it was stated had been given in the past.

We now refer to the concluding sentence of the preceding excerpt of the opinion, to the effect that Short testified that Clarkson & Co. took possession of the 35,312 quarter-sacks of flour, and that the fair

inference from his testimony and that of Davidson is that Clarkson & Co. thereupon commenced selling the flour and paying into the bank the proceeds thereof.

We would here urge that the question as to whether or not this draft was actually paid cannot be settled by "inference". If it was paid in whole or in part, the production of evidence showing that fact was easily obtainable either from the principal debtor, Clarkson, personally, the testimony of an employee of Clarkson & Co., or the books of the Russo-Chinese Bank. All of such avenues of testimony were open to the defendant below.

Yet such direct testimony as was attempted to be shown, instead of showing any payment of the draft, is quite to the contrary effect.

This draft matured on April 30, 1904, and was payable May 2, 1904.

Davidson testified (p. 197):

"I left Port Arthur on the 17th of February, 1904."

and (p. 198):

"After I left Port Arthur on the 17th of February, 1904, I had no connection whatever with the firm of Clarkson & Co. or their business."

And on January 30, 1904, Clarkson wrote a letter to Davidson dismissing him from his employment.

Short testified (p. 137) that he remained with Clarkson & Co. until February 4, 1904.

Neither of these witnesses, therefore, had any connection with Clarkson & Co. at the time this draft matured, or for more than two months prior to such maturity.

Concerning now any direct testimony as to whether or not Clarkson, as the opinion states, "commenced selling the flour", we refer first to the testimony of Short (p. 159):

"Q. Now, of your own knowledge, Mr. Short, can you positively state that you know whether any of this flour from the 'Hyades' was sold while you were there?

"A. From the 'Hyades'?

"Q. Yes.

"A. I can—no, I can't.

"Q. You cannot?

"A. I cannot state positively—the 'Hyades'.

"Q. (Mr. McCord). What was that question?

"A. If I state positively that any of the flour from the 'Hyades' was actually sold up to the time I left.

"Q. (Mr. Gregory). The facts were that there was a great deal of flour in the warehouse, was there not?

"A. There was from six to eight thousand sacks, I figure.

"Q. And whether or not the 8000 sacks that you say were sold was a part of the 'Hyades' flour or not you have no knowledge, have you?

"A. I have no knowledge.

"Q. No, no knowledge at all, and you are not able to state now here, are you, whether or not those 8000 sacks were paid for or were sold?

"A. Well, I would say that up to the time I left there they were not paid for.

"Q. Yes, they were not paid for.

"A. In fact I am positive, because it was sold through the Comprador or through the general accounts, which would not have been collectible in the—with the general accounts until the first of the following month and with the Chinese just as he collected it in from the Chinese who were subcontractors building the forts and roads.

"Q. *Do you know what became of the 'Hyades' flour?*

"A. The 'Hyades' flour?

"Q. Yes.

"A. *I don't.*

"Q. *Do you know whatever became of a single sack of it?*

"A. No, nothing other than what I have heard them testify to.

"Q. Yes, but of your own knowledge, I mean?

"A. No.

"Q. You don't know anything about that at all?

"A. I know that was in the warehouse of Clarkson & Company.

"Q. *Whether or not it was ever delivered out of the warehouse to anybody you can't say?*

"A. *I cannot say.*

"Q. *Whether or not the bank ever got any money for the draft you cannot say?*

"A. No, I cannot say.

"Q. Yes.

"A. *I don't know."*

Davidson testified on cross-examination (p. 210):

"Q. If you shall, in answer to the fifty-seventh direct interrogatory, state that you know that the draft in question was paid, then state the exact date when the same was paid and by whom, giving the manner of payment,

whether by check or by cash. If by check, state on what bank, the same was drawn, and, if possible, attach a copy thereof to this deposition?

“A. I have not made any such statement in answer to direct interrogatory number fifty-seven.”

and (p. 212):

“Q. Did you ever, prior to the commencement of this suit in April, 1908, inform the National Bank of Commerce of Seattle, or any of its officers, that the draft dated December 11th, 1903, for Thirty-six thousand one hundred and ninety-four and 80/100 Dollars (\$36,194.80) had been paid by Clarkson & Company to the Russo-Chinese Bank? If this information was given by letter, attach to this deposition copies thereof, and if oral, state as precisely as possible the terms of such communication?

“A. I did not.”

and upon direct examination (p. 194):

“Q. Do you know whether this draft drawn by the Centennial Mill Company and in the hands of the branch of the Russo-Chinese Bank at Port Arthur covering this shipment of flour was ever actually paid?

“A. No; I have no knowledge, definite knowledge, that it ever was paid since I left Port Arthur long before it fell due.”

These two witnesses, Davidson and Short, were the only witnesses whose testimony was either read or given in behalf of the defendant or who say anything about the flour for which the draft in question was given.

We now quote from the remaining portion of the court's opinion on this subject:

"It appears from the latter's testimony that by reason of orders of the Russian military authorities he was compelled to leave Port Arthur and did so on the 17th of February, 1904. Being asked on his direct examination when the last shipment of flour from the Centennial Mill Company to Clarkson & Co. arrived at Port Arthur, he answered that it arrived there about the 8th of February, 1904, but that he could not state positively as he was not there at the time; and being asked on what steamer that flour arrived at Port Arthur, answered: 'On one of the steamers operated by the Boston Steamship Company or the Boston Towboat Company, either the Hyades or the Pleiades'; and being asked as to the quantity of flour that arrived by the steamer so referred to by him, answered: 'Between thirty-five and forty thousand sacks'. In his subsequent testimony on both direct and cross-examination the witness was evidently quite confident that the steamer that brought that flour was the Pleiades, but the flour itself, the witness distinctly testified, was sold by him before leaving Port Arthur to the firm of Ginsburg & Co., which he testified was a large Russian firm doing an extensive business with the Port Arthur bank and with its principal place of business at that place, and which sale he testified he had to make in order to protect Clarkson & Co. against the war conditions then prevailing. His testimony is, in part, that he arranged with Ginsburg & Co. to pay a part of the money for which he sold the flour into the Port Arthur bank and to take a draft from that company on Shanghai in his favor, which he intended to pay into Clarkson & Co.'s branch at that place; and that he



took the head of the firm, Ginsburg, to the Port Arthur bank and explained to the manager of that bank the terms of the sale, to which he agreed.

“Short testified that the Pleiades arrived at Port Arthur about the 7th of February, and that he himself left there on board of that vessel, and that not more than 1500 or 2000 sacks of flour were landed at Port Arthur from that ship; so that the jury might well have concluded that the thirty-five or forty thousand sacks of flour which Davidson thought were brought by the Pleiades was the consignment of flour that the Hyades carried to that port a few weeks before. As a matter of course that, and all other inconsistencies in the testimony of the various witnesses, as well as their veracity, were matters for the determination of the jury, in the light of all of the facts and circumstances of the case. Moreover, there was testimony tending to show that from the 1st of January, 1904, to November 23d of the same year, Clarkson & Co. paid into the Port Arthur bank 126,928 rubles and 97 kopeks.”

This portion of the opinion is principally concerned with what we have called the Ginsburg transaction. It will be seen by the record that the plaintiff, from the time that this transaction was first mentioned, persistently, both by motions to strike out and objections to questions, insisted that this Ginsburg consignment of flour had nothing to do with the draft in question, because it was flour which arrived at Port Arthur ex “Pleiades”, whereas the flour in question was sent ex “Hyades”.

Here, also, fortunately, the record is clear and precise so that there can be no possible question con-

cerning it. We first have the stipulation between the parties (p. 122) as follows:

“It may be stipulated between the parties that the steamship ‘Hyades’ arrived at Port Arthur on January 16, 1904, and that she left Port Arthur for her homeward voyage on January 22nd, 1904.

“It may be also stipulated that the log book of the steamship ‘Pleiades’ will show that she arrived at Port Arthur on February 7, 1904, and that she left Port Arthur for her homeward voyage on February 13, 1904.”

The only witness for defendant that has mentioned this Ginsburg transaction is Davidson, and we now offer extracts from his testimony to show that he at all times, in speaking of the Ginsburg flour, definitely confined it to the cargo of the ship that arrived at Port Arthur on February 7, 1904; that is the “Pleiades”. The first mention that he makes of the subject is at page 186, where he said:

“On or about the 15th day of February, 1904, the Russo-Chinese bank did consent to the sale of the flour ex steamship ‘Hyades’, if that is the name of the steamer that arrived at Port Arthur on or about the 8th of February, 1904.”

We here emphasize the fact that the witness states that he is in doubt as to the name of the steamer, and that he identifies it only from its date of arrival. He was positive only as to the date of arrival. We know from the stipulation that the “Hyades”, carrying the cargo of flour in question, arrived at Port Arthur on January 16th, and left there on January 22nd, so that nearly a month had

elapsed after the discharge of the "Hyades" before this alleged consent of the Russo-Chinese Bank was given. But, as noted, the witness states that this consent was with reference to the cargo of the steamer that arrived on or about the 8th of February, 1904. Furthermore, Short testified that he, personally, had charge of the acceptance of the earlier draft, ex "Hyades", and, therefore, Davidson could not, as he says (p. 186), have personally notified the, at that time, manager of the Port Arthur branch of the Russo-Chinese Bank that *he* had made arrangements with the Russian firm by the name of Ginsburg & Co. to take over the flour and pay the draft, if this flour and draft refer to the ones in suit. Short handled for Clarkson & Co. the draft and attended to the business connected with the cargo in suit, viz., the "Hyades"; and Davidson, after Short had left Clarkson's employment, had the dealings with Ginsburg by which he sold the cargo of the "Pleiades", a steamer which arrived at Port Arthur after Short had left Clarkson's employ. This undoubted situation is shown by the further testimony of Davidson. Thus he states (pp. 188-189):

"Interrogatory No. 38.

"Q. When did the last shipment of flour from the Centennial Mill Company to Clarkson & Company arrive at Port Arthur?

"A. The last shipment of flour from the Centennial Mill Company to Clarkson & Company at Port Arthur arrived at that port on or about the 8th day of February, 1904, but I cannot say positively that I have got the

exact date as I was absent from Port Arthur at the time it arrived.

“Interrogatory No. 39.

“Q. Where had you been?

“A. Tientsin.

“Interrogatory No. 40.

“Q. On what steamer was this flour brought to Port Arthur?

“A. On one of the steamers operated by the Boston Steamship Company or the Boston Towboat Company. Either the ‘Hyades’ or the ‘Pleiades’.”

and on page 192:

“Interrogatory No. 48.

“Q. State whether or not Clarkson & Company disposed of any part of that shipment of flour?

“A. Clarkson & Company entered into an agreement with Ginsburg & Company to sell part of this flour, the actual quantity to be determined when delivery was taken.”

and upon cross-examination, he stated (p. 198):

“Q. What do you personally know of the shipment of 35,312 sacks of flour per steamship Hyades?

“A. All I know about this shipment is that a steamer belonging to either the Boston Steamship Company or the Boston Towboat Company and called either the ‘Hyades’ or the ‘Pleiades’ arrived at Port Arthur on or about the 8th of February, 1904, and while I was manager of the firm of Clarkson & Company at Port Arthur. Just when the steamer referred to arrived I am unable to give the precise date as I was away from Port Arthur on her arrival. On my return to Port Arthur on the afternoon of the 9th of February, 1904, I saw the steamer in the harbor. I arrived after a bombardment by the Japanese fleet \* \* \*.”

and p. 199:

“Q. Did not the Hyades arrive at Port Arthur January 17/30, 1904?

“A. To the best of my knowledge the steamer Hyades or Pleiades, whichever one it was, arrived at Port Arthur on the 8th day of February, 1904.”

He further testified (p. 200):

“I have no recollection of ever having seen such a draft”. (Referring to the draft in suit, dated December 11.)

and again (p. 204):

“Q. Was any of the flour you attempted to sell to Ginsburg & Company part of the Hyades flour?

“A. *The flour I sold to Ginsburg & Company formed a part of the shipment that arrived in Port Arthur on or about the 8th of February, 1904.*”

and again (p. 206):

“Q. How do you know that any such practice was followed in the case of the Hyades flour; when you had not been in the employ of Clarkson & Company or in Port Arthur for several months when the flour was sold?

“A. I was in Port Arthur when the flour was sold and as I sold the flour myself I know what I am talking about.”

This testimony makes clear as the light of day that Davidson had nothing to do with the Hyades flour.

It is not necessary that the jury have resorted to any “inference” or “surmise” as to the particular cargo of which the flour sold to Ginsburg formed

a part, for the reason that the only testimony upon that subject was given by defendant's witness, Davidson, when he said that the flour sold to Ginsburg formed a part of the shipment that arrived at Port Arthur on or about the 8th of February, 1904. This testimony was not changed or modified. It was given by defendant's witness and, therefore, binding upon it. Neither the court nor the jury can assume in the absence of any showing that this statement of Davidson was a mistake. To do so would be to set aside the most fundamental rules of evidence and to indulge in the assumption that because a witness states so and so, the deduction may be reasonably drawn that he meant something else. We respectfully ask how can this portion of the testimony, the only words in the entire record which pretend to state these particular facts, lead to any other conclusion than that the flour sold Ginsburg was not a part of the cargo brought by the "Hyades" and, therefore, could not have been the flour for which the particular draft in suit was given?

We would also urge that there is another circumstance equally conclusive that shows that the money paid by Ginsburg was not used to pay this particular draft or any part of it; this is that the money received by the bank from Ginsburg was *actually sent by the Port Arthur branch to the Seattle branch in payment of two other drafts drawn by the Centennial Mill Company, one for \$16,155.20 and the other for \$4,136.00.* The sum received from Gins-



burg was 67,000 roubles. The testimony concerning the disposition of this sum of the witness Friedberg is as follows (p. 26):

“Interrogatory 41. State what you know, if anything, of the payment to the Russo-Chinese Bank at Port Arthur by or for account of Clarkson & Co. of the sum of about 67,000 roubles on or about April 30th, 1904.

“Answer. On April 17/30, 1904, according to the cashbook of the Russo-Chinese Bank, Port Arthur, of same date the representative of Clarkson & Co. cashed a check endorsed by him, No. 1156, dated April 16, 1904, for 67,000 roubles, drawn by M. Ginsburg & Co. on their account with the Russo-Chinese Bank at Port Arthur. On the same date Clarkson & Co., paid to the bank (1) the equivalent of the draft, No. 1412/6386 for G. \$4,136 received from the National Bank of Commerce of Seattle, plus 6% interest on the same for 220 days=G. \$151.65=G. \$4,387.65, at the rate of 198=8489 roubles and 55 cop. (2) The equivalent of the draft No. 455/6500 for G. \$16,155.20 received from the National Bank of Commerce of Seattle, plus 6% interest on the same for 200 days, G. \$538.50=G. \$16,693.70, at the rate of 198=33053 roubles, 53 cop. (3) Expenses on the said drafts, bill stamps commission, telegram expenses and postage, 305 rbls. 80 cop. (4) That part to the credit of their own account with the Russo-Chinese Bank at Port Arthur 25,151 roubles 12 cop.

“Of course the bank could not enforce Clarkson & Co. to apply their money in one way or another and was obliged to merely follow their client's instructions. The proceeds of the draft 6386/1412 and 6500/1455 G. \$20,981.35 were remitted on the same date to the National Bank of Commerce of Seattle by telegraphic transfer on Ladenburg, Thalmann & Co., New York.

At that time the value of 67,000 roubles represented about \$33,838.88 United States currency, at the rate of 198.

"On the 17/30 day of April, 1904, the bank at Port Arthur had in its portfolio besides the draft for \$36,149.80 the documents which were attached to the following drafts of the Centennial Mill Co. drawn upon Clarkson & Co.: 1. G. \$4136, due February 27th, 1904, Russian style. 2. G. \$16,155.20 due March 8, 1904, Russian style. 3. G. \$23,468.40 drawn 90 days' sight. All these drafts had the following stamp "Payable at the Bank's demand, rate of exchange on New York at date together with interest at 6% per annum from date of this draft to estimated date of return of remittance in Seattle, Washington." The amount of the drafts G. \$4136 and G. \$16,155.20 was paid with interest as stipulated on the 17/30 April, 1904, and the amount of G. \$20,981.35 remitted to the National Bank of Commerce of Seattle by telegraphic transfer on Ladenburg, Thalmann & Co. of New York. The draft for \$23,468.40 was not accepted by Clarkson & Co. and had to be protested for non-acceptance on May 23d, June 5th, American style, 1904, and returned together with the deed of protest for non-acceptance to the National Bank of Commerce of Seattle on June 7/20, 1904.

"I do not know out of what funds Clarkson & Co. paid the drafts mentioned above, but I presume that Clarkson & Co. applied a part of the money cashed from the bank at Port Arthur against M. Ginsburg & Company's check for 67,000 roubles on the same day."

The witness Drozdov testified (p. 52):

"With reference to the payment into the Russo-Chinese Bank at Port Arthur for account of Clarkson & Co. of the sum of 67,000 roubles on or about April 30th, 1904, I know

that on the 17/30/IV/1904, the representative of Clarkson & Co. presented for payment a check drawn by the trading firm Ginsburg & Co. No. 1156, for Rbl. 67,000....., which was paid by the bank in Port Arthur; which is shown by the documents of the cash section of the bank and by the books of the bank for the year 1904, fol. 216 and 217.

“As shown by the cash-book of the bank, the representatives of Clarkson & Co. made on the same day the following payments:

“I. Rbl. 8489.55c. for payment of the draft of the National Bank of Commerce of Seattle, amount: G\$4136—6% for 220 days G\$151.65=4287.65 at the rate of exchange of Rbl. 198.—

“II. Rbl. 33053.53. for payment of the draft of the National Bank of Commerce of Seattle, amount: G\$16155.20—6% for 200 days G\$38.50=G\$16693.70, at the rate of exchange of Rbl. 198—

“III. Rbl. 174.50—the commission of the bank on the above drafts.

“IV. Rbl. 70.—telegraph expenses for the transfer of said drafts.

“V. Rbl. 60.30.—stamp duty on same.

“VI. Rbl. 1.00—postage on same.

“VII. Rbl. 25151.12 were deposited on account No. 7 of correspondents ‘Loro’ of the firm Clarkson & Co.

“At that time the value in G\$67,000 roubles was \$33,838.38.

“Besides the draft of G\$36.194.80.—in the portfolio of the Port Arthur Bank, towards 17/30 April, 1904, were the following drafts, drawn by the Centennial Mill on Clarkson & Co. and received for collection from the National Bank of Commerce of Seattle.

“I. Draft with enclosure of 1 bill of lading, 1 invoice and 1 insurance policy, 90 days’ sight, amount G\$4136.—received in letter, date 6/X. the bank acknowledged receipt of these docu-

ments in letter date 8/21/XI/1903. Clarkson & Co. accepted this draft on 27/10/XII/1903, term 27/11/1904 old style, and information thereof was sent to the National Bank of Commerce of Seattle on the same day.

“II. Draft with enclosure of 1 bill of lading, 1 insurance policy and 2 certificates, 90 days’ sight, amount G\$16,155.20 received with letter, dated 26/X/1903.

“The bank acknowledged receipt of these documents in letter dated 19/2/XII/1903. Clarkson & Co. accepted this draft on 8/21/XII/1903, term 8/21/III/1904 and information thereof was sent to the National Bank of Commerce of Seattle on the same day.

“Though both these drafts were not paid at maturity, the bank was deprived of the possibility of executing protest for non-payment by reason of the notary having left Port Arthur.

“Enclosed in the letter of the bank in Port Arthur, dated 13/26/IV/1904, these drafts were returned to the National Bank of Commerce of Seattle, and the belonging documents were kept in the bank pending receipt of further instructions.”

There is no evidence to the contrary.

This sum of 67,000 roubles was paid into the bank by Clarkson & Co. (not by Ginsburg) under special instructions. The bank, of course, had no alternative but to apply the sum so paid in accordance with these instructions, which were (1) to pay the two drafts of \$4,136.00 and \$16,155.20 with interest and costs and (2) to credit the balance of 25,151 roubles, 12 kopeks to the account of Clarkson & Co. with the Russo-Chinese Bank at Port Arthur.

This money was paid into the bank on April 30, 1904, and the draft in suit, viz., for \$36,013.70, did

not become payable by reason of the two days of grace until May 2, 1904 (p. 120).

On the day that this Ginsburg money was paid into the bank, April 30, 1904, Clarkson & Co. owed the Russo-Chinese Bank at Port Arthur on its general account, and entirely independent of the particular draft in question, a sum exceeding 41,000 roubles. Upon pages 36 and 37 of the record is contained a statement from the books of the Russo-Chinese Bank showing the amount of the indebtedness of Clarkson & Co. from December, 1903, to August 28, 1904, from which it will be seen that at all times up to May 28, 1904, Clarkson owed the bank on this general account a sum exceeding 25,000 roubles, which was the amount left over of the Ginsburg payment after the payment of the two other drafts.

We would, therefore, urge that as the testimony in this case now appears, it will require the denial of the truth of everything that was said by all the witnesses, and the assumption of the opposite of what they said, in order to justify any finding to the effect that any part of this Ginsburg money went toward payment of this particular draft. The evidence is clear, direct and uncontradicted, that it went into other channels and to pay other indebtedness. We therefore ask again, as we frequently have insisted upon asking in other phases of this case, what possible relevancy this Ginsburg transaction has to the particular subject matter involved? We may even go further and assume,

for the purposes of argument, that the testimony of Friedberg and Drozdov (the only testimony on the subject) is to be disregarded, and that the balance of the 67,000 roubles, some 25,000 roubles, was not in fact applied to the discharge of the general indebtedness of Clarkson & Co., and that Clarkson & Co., when making this deposit, did not make any request for its application, and even that these 25,000 roubles were, in fact, applied by the Port Arthur branch toward the discharge of the particular draft in question. Even assuming all these things, the Ginsburg transaction affords no basis for the special verdict of the jury, because the amount of this draft of \$36,194.80 was 72,389.60 roubles (p. 46) and the application of the 25,000 roubles could not, of course, have paid it in full.

The last statement in the opinion of facts, tending to show payment of this particular draft and in support of the special verdict of the jury, is "There was testimony tending to show that from the 1st of January, 1904, to November 23d of the same year, Clarkson & Co. paid into the Port Arthur bank 126,928 roubles and 97 kopeks".

This fact was elicited from the testimony of the witness Short, who, at page 151, was asked the following question:

"Q. Now, I wish you would turn to the cash account in the same deposition and state how much money was remitted by the Russo-Chinese Bank from Port Arthur to Vladivostok from January, 1904, down to August, 1904. Are you able to state it from that?"



to which the witness, after figuring, said:

“A. 79,000 roubles transferred from Port Arthur to Vladivostok from the 25th of March to the 26th of June.

“Q. Are you able to state how much money was collected in or received by the bank at Port Arthur from Clarkson & Company, between the 25th of January and down to so far as the account goes, August, I believe?

“A. From the first of January, 1904, up to the last statement on this account, November 23, there had been deposited with the bank 126,928 roubles and 97 kopeks.”

This testimony relates to the account between the bank and Clarkson & Co. at Vladivostok as well as at Port Arthur, and it shows that 79,000 kopeks had been paid by the bank to Clarkson & Co. at Vladivostok, and 126,928 roubles had been paid by Clarkson & Co. to the bank, showing payments by Clarkson, in excess of receipts of 47,928 roubles. But this does not show that this payment had anything to do with the particular draft in question for several reasons. In the first place, there is nothing to show that these 126,928 roubles so paid by Clarkson & Co. were derived in whole or in part from the “Hyades” consignment. No such claim is made. Upon the contrary, it appears from the testimony, already referred to, of the witness Friedberg (pp. 36-37-38) that during all this time Clarkson & Co. owed the bank on its general account large sums of money. It having been shown that there were many other transactions between these parties, no presumption can be indulged that this particular

balance of 47,928 roubles was used or had any relation with the payment of this particular draft, for as the testimony shows, there were many drafts and many other transactions.

We here invoke the rule that the presumption that a draft is unpaid, which arises from the payee's possession of the draft uncanceled, is not sufficiently met by showing a payment of money by the debtor without a further showing that there were no other dealings between the parties upon which such payments might have been made.

In this case it is undisputed that the draft was protested for non-payment and mailed to the Seattle bank with a letter stating that it had been protested for non-payment and was not paid. This draft, therefore, ever since has been, and now is, in legal contemplation in the actual possession of the Seattle bank. From this possession, the presumption arises that it has not been paid. This presumption cannot be overcome by simply a general showing that between certain dates, Clarkson paid the bank certain sums of money, because in order to do so, it would have been necessary to show that this was the only draft and the only transaction upon which the money so paid could have been applied.

In the case of *Somervail v. Gillies*, 31 Wis. 152, a similar question was considered, and the court said:

“This case, so far as the decision depends upon presumptions arising from the facts proved, is one where the presumptions conflict and run directly counter to each other. The

presumption of payment, arising from the maker's having paid or delivered money to the payee of the note, is encountered by the opposite presumption arising from the note remaining in the hands of the payee or his legal representative, uncanceled and with no receipts of the alleged payments endorsed. The mere fact of the payment by one person to another is presumptive evidence of the payment of an antecedent debt, and not of a loan. In the present case, had it been shown that there were no other dealings between the parties, and that no other indebtedness existed than upon the note in suit, the proof of payment of money by the maker to the payee of the note would have created a very strong and almost conclusive presumption of payment upon the note. But no such facts were shown, and herein the weakness of the defense and imperfect and unreliable nature of the presumption are disclosed. Conceding both sums of money represented by the checks to have been paid by the maker to the payee, of which the check for one sum, payable to bearer and without the payee's receipt for the money endorsed thereon, was no evidence, still they may have been payments upon other debts due from the maker to the payee, instead of upon the debt due upon the note; or they may have been payments made in the course of other dealings or business transactions between the parties. Under such circumstances, to give the maker of the note the benefit of the presumption claimed for him, requires at the same time the aid of another presumption, which cannot be indulged, namely, that there were no other debts or dealings to which the payments could have been applied. The presumption of payment of the note, therefore, arising from the mere fact of payments of money being shown to have been made by the maker to the payee, is not only met, but

in fact overcome, by the presumption arising from the possession of the note by the payee still uncanceled and unextinguished by indorsements of payments upon it. The presumption, when a note has been paid, is, that it has been taken up by the maker, or otherwise canceled so as to show that the debt is extinguished. When paid, the maker is entitled to delivery of it, and such is the usage of merchants and all persons giving and receiving such paper. If but a partial payment is made, the custom is for the maker, at the time of paying, to see that it is endorsed. From these well known usages arises the presumption, which, until rebutted, is decisive, that an outstanding note is still unpaid. This presumption the evidence in this case failed entirely to rebut, and the court was correct in the special instruction given, that the burthen was upon the maker to show that the checks in question were given and received as payments on the note, and that no presumption could be made from such mere payments against the note in the hands of the holder."

We have now endeavored to pass in review all the facts and circumstances mentioned in the court's opinion as going to uphold the special verdict of the jury. We do not again refer to the evidence showing that the draft was not paid; we recognize that this court will not set aside a verdict upon the ground of a conflict in the evidence or inconsistencies therein. Our claim is that there is no legal evidence in any of the facts and circumstances mentioned to show that this draft was, in fact, paid. We summarize as follows:

1. That Short gave and the bank accepted a letter of guaranty is immaterial unless it be shown

that Clarkson & Co. acted on this letter of guaranty and did actually dispose of the flour. There is no evidence whatever to this effect, because Short, the only witness interrogated on the subject, testifies that he does not know that a single sack of the "Hyades" cargo was ever sold or any money ever paid into the Russo-Chinese Bank therefor.

2. The 67,000 roubles derived from the Ginsburg sale were not applied in payment of this draft for two reasons:

- (a) It concerned another cargo of flour;
- (b) This money was used to pay other drafts and indebtedness.

3. The fact that Clarkson & Co. paid the Port Arthur Bank, between January 1, 1904, and November 23, of the same year, 126,928 roubles and 97 kopeks is no evidence that this sum, in whole or in part, was applied on this draft because there was evidence of many other dealings between the parties upon which this payment might have been applied.

The fact, also, that this case has a double aspect, and that plaintiff is entitled to recover either upon an implied or an express contract should not be lost sight of. The express promise of defendant to repay this money was (p. 93):

"We on our part agree upon return to us of both sets of bills, showing that the draft has not been paid, to reimburse you in the sum paid us, provided that we were in no wise injured by the fact that your Port Arthur branch has indefinitely held the bills after their maturity at

which time they could have been returned to us and we could have collected from the steamship company."

The only evidence required by the defendant bank by this agreement showing that the draft had not been paid was "the return of both sets of bills". These bills were returned; therefore plaintiff complied with the only condition precedent imposed upon it, and defendant should not subsequently be heard to say that it was not sufficient.

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## II.

### NO CUSTOM OR USAGE CAN AFFORD A PRESUMPTION THAT A PARTY WILL VIOLATE HIS CONTRACT.

The principal, and as we think the only, argument advanced to show that this draft was paid is the evidence that for a considerable period of time the Port Arthur branch had permitted Clarkson & Co. to dispose of flour, without payment, upon delivery of a letter of guaranty. The claim is that because the bank had so acted in previous cases it did so in this case.

If we assume that these previous consignments were governed by the same instructions as the present one, viz., against payment, there, nevertheless, can be no custom or usage which would warrant either court or jury in assuming that because the bank had violated its instructions in the past it did so in the present case.



That Clarkson took possession of the 35,312 quarter-sacks of flour and commenced selling it and paying into the bank the proceeds is stated by the court in the opinion to be "a fair inference from the testimony of Short as well as that of Davidson".

Now Short testified that he gave the bank the letter of guaranty, and we may assume also that the manager of the bank then acquiesced in his taking the flour, although this latter is not directly stated. But here Short's testimony stops, because he says that he does not know what was done with the letter of guaranty or whether or not any of the flour was sold thereunder. We must, therefore, as this court has done in its opinion, invoke a presumption, if we are to have any evidence whatever that Clarkson & Co. ever did take the flour and sell it, for of direct testimony there is none. This inference or presumption must be that because Clarkson & Co. had previously taken possession of and sold flour without paying for it, that they did the same thing in this case.

The instructions in the present case were to hold the documents against payment, and any presumption that the bank permitted this flour to be sold contrary to these instructions and that it was so sold must be predicated upon an illegal act, not only of the bank but also of Clarkson & Co., because Short testifies that he knew that the bank held these bills of lading against payment of the draft. As agent of the steamship company Clarkson & Co. knew, not

only from the direct language of the contract, but also from the general law merchant, that the steamship could not legally surrender possession of the cargo except upon a surrender of the bills of lading. They furthermore knew that they had been specifically directed by Clarkson to require the surrender of the bills of lading, so to assume that Clarkson & Co., as agent of the steamship company, because they had been accustomed to deliver cargoes in the past without surrender of the bills of lading, did so in this case, necessarily requires the presumption that a contract was violated and indeed that a crime had been committed because Short said it was a criminal offense (p. 163).

“It has been repeatedly asserted by the courts that a custom or usage to be valid must not be contrary to law. The rule stated more in detail is that evidence of custom or usage is inadmissible to contravene clear and unambiguous statutory or contractual provisions, or well-settled rules of public policy; or to oppose or alter established legal principles and upon a given set of facts make the rights or liabilities of individuals other than they are at the common law.”

*Eng. & Amer. Enc. of Law*, Vol. 29, p. 376.

Custom or usage cannot be invoked to prove that any contract has been violated. There can be no presumption that a party violates a particular contract because he has been accustomed to violate similar contracts in the past, for the presumption is that the law has been obeyed, and that the person's acts are legal, not illegal. Hence, to permit a

course of dealing, admittedly illegal, to afford a presumption of a continuance of such illegal acts involves a conflict of presumptions. There is no presumption that an illegal act or course of dealing is continued. The ordinary presumption is "that a thing once proved to exist continues as long as is usual with things of that nature."

*Cal. C. C. P. Sec. 1963, Subd. 32.*

It involves an absurdity to say at least in legal contemplation that there is any presumption that it is usual in contracts of this character to violate them.

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### III.

**IF ANY OF THE INSTRUCTIONS CONCERNING THE OBLIGATIONS OF THE PORT ARTHUR BRANCH RELATIVE TO THE FLOUR WERE ERRONEOUS, ERROR MUST BE PRESUMED, AND SUCH ERROR IS NOT CURED BY THE SPECIAL VERDICT. HEREIN IS PARTICULARLY DISCUSSED THE INSTRUCTION THAT PERMISSION TO TAKE THE CARGO WAS EQUIVALENT TO PAYMENT OF THE DRAFT.**

As fully noted in our brief, the trial court instructed the jury at length concerning the relation of the collecting bank to the consignment of flour. The jury were told that the plaintiff was required to deal with the property in the same way that an intelligent and prudent owner of property would deal with his own property, and that

"As the agent for the owner it was obligated to account for the amount of the draft, to ac-

count for the security which the bill of lading constituted, and it cannot be excused from obligation to account by saying that the flour disappeared with its knowledge, and require the defendant in this case in order to fasten an obligation upon it, to prove that it was negligent" (p. 233).

and further:

"By virtue of these endorsements and transfers the legal title to the draft and the documents and to the flour in question passed to and became vested in the Russo-Chinese Bank, and I instruct you that as a matter of law it was in the power of the plaintiff to handle, control, sell and dispose of such flour in any way that was deemed expedient by the plaintiff" (p. 227).

Coupled with the assignments of error predicated upon the giving of these instructions were others as to the refusal to give instructions requested by the plaintiff to the effect that in the absence of any special instructions the obligations of the collecting bank were to preserve the documents safely, to present the draft for acceptance, and upon the non-payment protest it; that in any event the plaintiff bank was bound to use only reasonable and ordinary care and skill. These instructions so refused are set forth at length on pages 15 to 19 of our brief.

It is undisputed that this draft was sent to the Port Arthur branch "for collection" and without further instructions.

We will not now weary the court by a repetition of our previous argument in the endeavor to show that these instructions imposed upon a collecting

bank a responsibility quite foreign to their employment; that the instructions given and all the circumstances of the case show, beyond question, that the Port Arthur branch was merely employed as an agent to handle these documents; and no special instructions having been given, although requested, the Port Arthur branch were justified in assuming that they had no responsibility concerning the flour.

In addition to these instructions, the court also instructed the jury as follows (this instruction has already been copied in this petition and is here repeated for convenience):

“If you find from the evidence in this case that plaintiff permitted Clarkson Company to take over the flour under such an arrangement as the defendant claims with the stipulation that the plaintiff was the owner of the flour and with the agreement that Clarkson & Company would account to the plaintiff for the proceeds of the sale of the flour, then I instruct you that such action on the part of the plaintiff constitutes in law a payment of the draft in question and the plaintiff cannot recover and your verdict must be for the defendant.”

We now claim that these instructions are inseparably connected with the special verdict; that if they be wrong, error necessarily must be presumed and the special verdict fall. We believe the general rule as adopted by the federal courts is that error presumes prejudice; that it is only when it appears so clear as to be beyond doubt that the error challenged did not prejudice, and could not have preju-

diced, the complaining party, that the rule is applicable that error without prejudice is no ground for reversal.

*Boston etc. R. R. v. O'Reilley*, 158 U. S. 334;

*U. S. v. Gentry*, 119 Fed. p. 75;

*Union Pacific R. R. v. Field*, 137 Fed. p. 18;

*Choctaw R. R. Co. v. Holloway*, 114 Fed. p. 465;

*Stewart v. Brune*, 179 Fed. p. 355;

*U. S. v. Ute Coal & Coke Co.*, 158 Fed. p. 29;

*Durant Min. Co. v. Percy Cons. Min. Co.*,  
93 Fed. p. 169.

In the case of *Atchison, Topeka & Santa Fe R. R. v. McClurg*, 59 Fed. 863, the court said:

“Unless it clearly appears from the face of the record that the error was harmless, we are not allowed to speculate as to its probable consequences.”

The instructions given concerning the flour were tantamount to an instruction to find a verdict for the defendant, because, as noted, the jury were told that the collecting bank could not be excused from its obligations to account by saying that the flour disappeared without its knowledge. This could mean nothing other than that the plaintiff was required either to produce the money or the flour. It could not avoid liability, as the jury were told, by simply proving or showing that it had not had possession of the flour and did not know where it was. Apparently, under these instructions, if this flour had been lost *en route* and never reached Port Arthur, still the Port Arthur bank would be liable



because in that case the flour would have "disappeared without its knowledge".

These instructions are directly connected with the special verdict by the last instruction above quoted. For having first told the jury that the responsibility of the Port Arthur branch was the same as that of any owner of the flour, and that the bank was, in fact, for the purposes of this transaction, the owner of the flour, the jury is next instructed that if the plaintiff permitted Clarkson & Co. to take over the flour under the arrangement testified, then that such action constituted *a payment of the draft in question*. Under these instructions, when the jury proceeded to deliberate upon this special verdict their consideration was not limited to the question of a payment *in money*; on the contrary, if they believed that plaintiff had permitted Clarkson & Co. to take over the flour under the letter of guaranty, then they were *compelled* to return the special verdict as they did, although they may have believed that there was no evidence whatever that any payment in money had been received.

We ask, under the authorities cited, if this record contains anything which shows that the error in giving these instructions was "harmless"? It would seem that to the contrary the entire theory of the trial court, as announced to the jury, compelled the special verdict. It is not possible that instructions so fundamental and underlying to the fullest extent the most primary obligations of the parties could be harmless error.

We urge in particular that the instruction above given, that permitting Clarkson & Co. to take over the flour was in itself a payment, is obvious error, to which exceptions were fully taken. It will be noted that the jury were told, as a matter of law, that they need only find a single fact, viz., that plaintiff did give this permission, and from such fact alone the jury were directed to return a special verdict that the draft had been paid, and a general verdict for the defendant.

If we consider that the plaintiff bank did permit Clarkson & Co. to take over this flour under the arrangement testified and, indeed, if we go to the extent of admitting that the plaintiff bank delivered to Clarkson & Co. the bills of lading contrary to instruction, even then such act, as a matter of law and without the consideration of other facts, cannot conclusively be considered a *payment*.

The damages resulting from a conversion of property are clearly defined in law. If an agent wrongfully converts the property of his principal to his own use, then the detriment caused by this wrongful conversion is presumed to be the *value of the property* at the time of the conversion with interest, to which some authorities add a fair compensation for the time and money expended in pursuit of the property.

If, therefore, this instruction were correct in other respects, it should have stated that if the plaintiff bank was guilty of a conversion of the flour, then that it was liable in damages to the owner of the

flour for the *value* thereof, but such liability is not a *payment* of the draft, or the amount of the draft for the obvious reason that the jury is, in such a case, required to pass upon the value of the property so converted; they might have concluded that it was worth more or less than the face value of the draft. In any event, the plaintiff bank, charged with this liability, has the right to have a *jury* pass upon the extent of this liability, and the *court* cannot say, as a matter of law, that it was the face of the draft.

That this instruction is erroneous would seem to follow directly from the argument for defendant in error made in this case. At pp. 20-21 of his brief counsel cites authorities to the effect that where a collateral note is released and the proceeds received by the pledgee it operates as a payment *pro tantum* of the debt secured, and counsel say:

“We believe it to be a well settled principle of law that where a pledgee without specific instructions takes over the collateral to itself or releases the collateral from the pledge, such release of the collateral operates in law as payment of the claim at least to the extent of the value of the collateral.”

In this case the court has instructed the jury that a release of the collateral operates in law as a payment to the full extent of the claim, but has omitted to state the essential words, “to the extent of the value of the collateral”.

This instruction also omits another essential element in the relations between these parties, for it

is admitted that this draft was *accepted* by Clarkson & Co., who then became its principal debtor. This draft was mailed to the Seattle bank and in legal contemplation was, therefore, returned to it. If it disappeared then a copy was equally good evidence. There is nothing in this instruction, nor is there any evidence, that the Seattle bank ever attempted to collect from Clarkson & Co. the amount of this draft, or made any demand therefor. If the Port Arthur branch did violate instructions it was nevertheless, the duty of the creditor, the Seattle bank, to make the damages resulting from this negligence as light as possible. They could not have recovered anything against the Port Arthur branch in a direct suit predicated upon negligence without alleging and proving that by such acts the promise of Clarkson & Co. had become valueless. Now, there is no evidence here that Clarkson & Co. have not at all times been able to pay this draft. Under no possibility could the Seattle bank in such a suit have avoided alleging in its complaint that by reason of such negligence the plaintiff had been placed in a position where it *could not collect the draft*. Yet, as noted, the record is entirely silent on this subject. This instruction, therefore, is again erroneous in that it should have stated that "if the Seattle bank by virtue of these acts of alleged conversion had lost its rights against the primary debtor, etc."

The error in this instruction is again strikingly shown in the fact that it makes the "permission" of the bank equivalent to "payment".

To constitute a conversion there must be not only the intent but also the consummation of such intent. The mere fact that the agent gives an illegal permission is not a conversion.

“Conversion is an unauthorized assumption and *exercise* of the right of ownership over goods or personal chattels belonging to another to the alternation of their condition or the *exclusion of the owner's rights.*”

*Bouvier Law Dict.*

If this had been an ordinary action for damages against the Port Arthur branch on account of this alleged conversion, the complaint must necessarily have alleged that the defendant bank not only gave its permission, but that the flour was actually taken over by Clarkson & Co. and the plaintiff thereby deprived of it. Failing in this, the complaint would not state a cause of action.

So, in the present case, if by any slack definition of terms it may be said that the liability of the Port Arthur branch, resulting from its unauthorized act, was a payment of the draft, still, even under such theory, it was necessary that the instruction state not only that this illegal permission was given, but also that it was acted upon and that the flour was taken over by Clarkson & Co. and sold or disposed of in such way that the true owners of the flour could not recover it. The fact that the owner by defendant's acts lost the *property* is of course a necessary element of any action on the case for a conversion.

This instruction does not contain this essential element to any act of conversion, and therefore we urge that it is erroneous, even though there had been ample evidence as to what had become of the flour. But there is no such evidence and the record is silent upon this subject.

The witness Short testified (p. 148) when asked the question:

“Q. What became of the flour securing these drafts?

“A. They were put into Clarkson’s warehouse and afterwards sold.”

But he was then testifying concerning the *two other drafts* for \$4136 and \$16,155, respectively (p. 147). Concerning the flour in question he said (p. 141):

“Q. How many sacks of flour, if you know, were sold by you between the time of the acceptance of the draft and the time you left Clarkson & Co.’s employ?

“A. Well, sold by Clarkson’s office, including myself, I should say about ten or twelve thousand bags.

“Q. To whom was that sold?

“A. It was sold mostly through the compradores by Clarkson & Co. to Chinese contractors working on the forts and on the government roads.”

This testimony was not given concerning the “Hyades” flour specifically, but concerning all the flour in the warehouse at the time. This is clearly shown by the statement, upon cross-examination, of the same witness, already fully quoted, to the effect (pp. 159-160) that of his own knowledge he



did not know whether or not these 8000 sacks of flour were a part of the "Hyades" cargo, and that he did not know whether any of the "Hyades" flour was sold.

When all of the testimony of this witness is read, it will be seen, we think beyond any possibility of argument, that he does not pretend to say that he knew whether or not any of the "Hyades" flour was ever sold. The circumstances of the arrival of the vessel, and his severance of relations with Clarkson & Co., and departure from Port Arthur would make such personal knowledge on his part impossible.

The only other witness, Davidson, gave no testimony on this subject concerning the "Hyades" flour, except as the Ginsburg sale may be considered a part thereof, a subject which we have already fully discussed. As frequently already stated in this petition, he answered in response to direct interrogatory No. 56 (p. 194) that he did not know whether or not this draft was ever actually paid since he left Port Arthur long before it fell due, and he is positive that the flour he sold Ginsburg & Co. (p. 204) formed a part of the shipment that arrived in Port Arthur on or about February 8, 1904.

We therefore urge that the instruction now under consideration is erroneous in at least three particulars:

(1) That the jury should have been told that the liability of the bank for such alleged conversion

was the value of the property converted and not necessarily the face of the draft; that in no event could it be a payment of the draft.

(2) That the instruction given makes the "permission" of the bank a complete conversion without the necessity of any finding by the jury as to whether or not that permission was ever acted upon.

(3) That this claim against the bank called payment is nothing other than a claim for damages arising from negligence and that the damages in such a case cannot be greater than those actually sustained. To prove these damages, evidence that the Seattle bank had thereby been unable to collect from Clarkson is essential and the instruction is fatal in not thus stating.

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#### IV.

#### **THERE WERE ERRORS IN THE ADMISSION AND EXCLUSION OF TESTIMONY WHICH WERE NOT CURED BY THE SPECIAL VERDICT.**

We have already referred (we fear at wearisome length) to the examination of the witness Davidson concerning previous transactions between the Port Arthur branch and Clarkson & Co. These interrogatories and answers concerned the course of dealing between the parties in the handling of previous drafts with documents attached. A fair sample of these questions is the following (p. 179):

"Q. What is the custom of the Port Arthur bank upon the arrival of shipments where

drafts with bills of lading are attached are in their hands for collection?"

To this question an objection already printed in this petition was made to the effect that the question was immaterial until the character of the draft or the instructions accompanying it were first stated. That is, the witness might have been testifying to a transaction in which the Port Arthur branch had been authorized to deliver the bill of lading when the draft was accepted. Until that essential fact was developed, the testimony could have been of no value.

Nevertheless this objection was overruled and the question answered at length. Then there followed many other questions, all bearing upon the method adopted by the Port Arthur branch in previous cases, and to each of these questions the same objection was made and exception allowed.

The witness Davidson was not asked, nor did he pretend to state that he had any knowledge of the instructions that accompanied any set of drafts. We therefore again earnestly request the court to again consider this line of questions and the objections thereto.

We also again venture to invite the court's consideration to the alleged error assigned and discussed on pages 57-58 of our brief. This ruling occurred in connection with direct interrogatory 56 of the witness Davidson (page 194). The question was:

“Do you know whether this draft drawn by the Centennial Mill Company and in the hands of the branch of the Russo-Chinese bank at Port Arthur covering this shipment of flour was ever actually paid?”

To which the witness answered:

“No; I have no knowledge, definite knowledge, that it ever was paid since I left Port Arthur long before it fell due. But if it was not paid by Ginsburg & Company then it was the fault of the Russo-Chinese Bank because the firm of Ginsburg & Company to my definite knowledge have ever since been able to pay this draft and if for any reason the arrangement I made with Ginsburg & Company was avoided or not carried out then the Russo-Chinese Bank had it within their right and power to demand the surrender of the keys to the warehouse from Ginsburg & Company.”

The plaintiff objected to that portion of the answer beginning with the words “but if it was not paid” for the reason that the witness had already stated that he did not know whether it was paid or not. The matter so objected to was highly detrimental to the plaintiff because the witness there definitely stated that the firm of Ginsburg & Co. had always been able to pay this draft, and thus, although the witness knows nothing of his own knowledge concerning the matter, he is allowed to place before the jury his inference or surmise that it might have been paid if the Russo-Chinese Bank had carried out the arrangement with Ginsburg. Neither the question nor the special matter called for permitted any inference or surmise.

If "A" sues "B" upon a promissory note, and the witness is asked if he knows whether or not the note was ever actually paid, and he answers "No", is he properly permitted in answer to this same question to state "but it might have been paid if so and so had happened"?

If these questions and rulings upon these questions asked the witness Davidson were erroneous, they must of necessity have been prejudicial to the plaintiff because they were directly concerned with the question of the payment of the draft.

For these reasons we ask for a rehearing in this case.

Dated, San Francisco,  
August 6, 1913.

CHICKERING & GREGORY,  
*Attorneys for Plaintiff in Error.*

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#### CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for plaintiff in error in the above entitled cause and that in my judgment the foregoing petition is well founded in point of law as well as in fact and that said petition is not interposed for delay.

WARREN GREGORY,  
*Attorney for Plaintiff in Error.*





IN THE

# United States Circuit Court of Appeals

FOR THE  
NINTH CIRCUIT

RUSSO-CHINESE BANK, a Cor-  
poration,

*Plaintiff in Error,*

VS.

THE NATIONAL BANK OF COM-  
MERCE OF SEATTLE, WASH-  
INGTON,

*Defendant in Error.*

No. 2182

Upon Writ of Error to the United States District Court  
for the Western District of Washington,  
Northern Division.

## BRIEF FOR DEFENDANT IN ERROR.

The argument set forth in the petition for re-  
hearing filed herein does not seem to us to add any-  
thing to the former argument of counsel for the

Russo-Chinese Bank. Substantially every contention contained in the petition for re-hearing was vigorously urged in their former brief, and our argument in opposition to the same is set forth in our original and supplemental briefs heretofore filed in this cause, to which we now refer.

The first contention of the plaintiff is stated by counsel as follows:

“We still urge that there is no legitimate evidence that the draft in question has ever been paid. Upon the contrary, that the evidence is clear and conclusive that it has never been paid.”

And upon pages 40 and 41 of the petition counsel summarize their contention as follows:

(1) “That Short gave and the bank accepted a letter of guaranty is immaterial unless it be shown that Clarkson & Company acted on this letter of guaranty, and did actually dispose of the flour. There is no evidence whatever to this effect, because Short, the only witness interrogated upon the subject, testifies that he does not know that a single sack of the Hyades cargo was ever sold, or any money ever paid into the Russo-Chinese Bank therefor.”

(2) The 67,000 roubles derived from the Ginsburg sale were not applied in payment of this draft for two reasons:

(a) It concerned another cargo of flour.

(b) The money was used to pay other drafts and indebtedness.

(3) The fact that Clarkson & Company paid the Port Arthur Bank, between January 1, 1904, and November 23 of the same year, 126,928 roubles and 97 kopeks is no evidence that this sum, in whole or in part, was applied on this draft, because there was evidence of many other dealings between the parties upon which this payment might have been applied.

The particular evidence tending to show the payment of the draft for \$36,194.80, the price of 36,000 sacks of flour sold by the Centennial Mill Company to Clarkson & Company, is set forth by us in our original brief, pages 11 to 24, inclusive, to all of which we refer and make a part of this argument.

Counsel in the petition criticizes the reasoning of this Court in its opinion, holding that there was an absence of evidence to support the special verdict of the jury to the effect that the draft had been paid.

We do not think we can add anything to the logic or force of the Court's opinion. It seems to us to be clear, convincing and unanswerable. Counsel admit on page 6 of their petition that if the letter of hypothecation was taken by the bank, as testified to by Short, such action "would, without doubt, have been negligence on the part of the bank for the con-

sequences of which it would be responsible;" but asserts that "it would not have been payment of this particular draft, and cannot of itself make possible this special verdict of the jury."

It therefore appears from counsels' own admission that if the Russo-Chinese Bank did take a letter of hypothecation from Clarkson & Company, as shown by Short's testimony, then the bank became responsible for the loss. Counsel admit that the bank violated its duty to the defendant if it did take the letter of hypothecation, and there is no contradiction in the testimony as to the fact that the letter of hypothecation was taken by the bank, by the terms of which the bank permitted Clarkson, as agent of the Steamship Company, to deliver the flour over to Clarkson, the merchant, and to sell the same, taking Clarkson's agreement to account to the bank for the proceeds of the sale of the flour.

We might say, in passing, that one of the defenses set up in the answer was that if the Russo-Chinese Bank failed to collect the amount of the draft, such failure was due to its own negligence and breach of duty which it owed the defendant; and now counsel admit that if the letter of hypothecation was given the bank became liable to the extent

of the damage, and it necessarily follows that the plaintiff owes to the defendant the value of the flour, or the amount of the draft.

The testimony of Short disclosed that at the time of the acceptance of the draft in question there were in Clarkson's warehouse at Port Arthur only six or eight thousand sacks of flour; that 36,000 sacks were placed in the warehouse upon the arrival of the "Hyades;" that between the date of the arrival of the "Hyades" and the time that Short left Port Arthur, about the 9th of February, 1904, ten or twelve thousand sacks of flour had been sold. This will leave from 32,000 to 34,000 sacks of flour in Clarkson's warehouse, and there is no dispute as to the value of the flour. The value of the flour was from 2.40 to 2.65 roubles per sack (Rec., p. 152), and there was no other merchandise in excess of the value of about 15,000 roubles in Clarkson's warehouse at the time Short left Port Arthur.

By the terms of the letter of hypothecation the Russo-Chinese Bank assumed complete ownership of the flour and took Clarkson's obligation for its payment. The bank directed the Steamship Company to surrender the flour, and in lieu of the flour took Clarkson's promise to pay for it out of the proceeds

of its sale. This clearly shows an intentional conversion of the flour by the bank, and the testimony in the case fixes the value of the flour at a sum in excess of the amount of the draft. The conversion could not have been more complete had the Russo-Chinese Bank, vested with the legal title to the flour, sold it directly to Clarkson and taken Clarkson's note in payment of it. Could it have been contended that there was no conversion had the bank taken the note of Clarkson for the amount of the draft? The effect of what the bank did was to take Clarkson's promise to pay, or his written obligation, as shown in the letter of hypothecation. In lieu of the flour the bank received the written promise to pay. The taking of the letter of hypothecation containing a promise to pay was an acceptance by the bank of payment by Clarkson in this way instead of in money. The situation would not have been different in legal effect if Clarkson had paid for the flour in money and the bank had then re-loaned the money to Clarkson, taking as its security the letter of hypothecation.

The authorities which we have cited in our original brief are to the effect that if the holder of collateral sells or converts the collateral he becomes



liable for the value of such collateral and must apply it upon the indebtedness, and that evidence of such conversion can be shown under a plea of payment.

“Upon the plea of payment, to debt on bond, it is competent for the defendant to give in evidence that wheat was delivered to the plaintiff on account of the bond at a certain price, and that the defendant assigned sundry debts to the plaintiff, part of which were collected by the plaintiff, and part lost by his indurgance or negligence.”

*Buddicum vs. Kirk*, 3 Cranch, 294, and other cases cited.

And in this instance the value of the flour converted is shown to be in excess of the amount of the draft, and we cannot view it in any other way than as a payment of the draft.

It would not be material, it seems to us, whether the flour was ever sold by Clarkson or not. It passed beyond the control of the defendant when the Russo-Chinese Bank advised Clarkson, the agent of the Steamship Company, to turn the flour over to Clarkson, the merchant. The defendant was deprived of its security by this action of the bank, and the bank's action constituted a payment by Clarkson to it.

However, the evidence does clearly show, beyond the possibility of a doubt, that the flour in question was sold by Clarkson & Company. There were only 32,000 to 34,000 sacks of flour left in Clarkson's warehouse on the 9th of February. Shortly thereafter, and before the 17th of February, when Davidson left Port Arthur, the balance of the flour in the warehouse was sold to Ginsburg, through the instrumentality of the plaintiff. The evidence shows that at least 67,000 roubles were received for this flour, and the evidence of Short is that there was no other flour in the warehouse belonging to Clarkson. How, then, can it be said that there was no evidence of the sale of this flour by Clarkson? We know that Davidson received from Ginsburg some money and some drafts on Hong Kong, and that the Russo-Chinese Bank collected from Ginsburg 67,000 roubles, all for flour sold by Clarkson from his Port Arthur warehouse, and the "Hyades" flour was the only flour in the warehouse. Consequently the evidence affirmatively shows that Clarkson & Company not only received permission from the Russo-Chinese Bank to take over the flour shipped by the "Hyades," and to sell the same under a promise to account for the proceeds of the sale, but that Clarkson & Com-

pany actually acted under such permission and actually sold the flour, and the instructions on pages 6 and 7 of the petition are not erroneous, even under counsel's own argument. Counsel admits that if permission were given by the bank to Clarkson & Company to sell the flour, and Clarkson actually sold it and failed to account for the proceeds, this would be equivalent to a payment. Yet the facts are that this is exactly what was done. Permission was given to sell the flour and it was sold, and the value of the flour is not contradicted, which was an amount at least equal to the draft.

Even if counsel were correct (which we do not admit) in stating that the defendat should only be entitled to the value of the collateral by reason of the negligence of the Russo-Chinese Bank, still under the evidence in this case the value of the flour is clearly shown, and is equal to the amount of the draft. So it was not necessary to give any instructions as to any partial liability on the part of the Russo-Chinese Bank. The evidence was conclusive and uncontradicted that the breach of duty on the part of the Russo-Chinese Bank resulted in the total loss of the flour, which was of a value in excess of the amount of the draft.

Upon page 10 and following pages of the petition the contention is made that the evidence of the custom among bankers at Port Arthur was inadmissible. This point is discussed in our original brief, pages 32 to 36, and we here refer to the same. But the evidence as to the custom among bankers was clearly admissible for another reason. Counsel makes the contention that when the 67,000 roubles were collected by the Russo-Chinese Bank from Ginsburg, 42,000 roubles of this money were sent to the National Bank of Commerce in payment of two other drafts, one for \$4,136 and the other for \$16,155, drawn by the Centennial Mill Company upon Clarkson & Company and in favor of the defendant bank. The inference that counsel seem to draw from this contention is that the defendant bank received a portion of the proceeds of the "Hyades flour and therefore has not been injured. The fact of the matter is, and the evidence shows, that prior to the shipment of the "Hyades" flour two other shipments of flour had been sold by the Centennial Mill Company to Clarkson & Company, for \$4,136 and \$16,155, respectively, with bills of lading attached drawn against payment, and that the Russo-Chinese Bank permitted Clarkson & Company to take over the flour

represented by these shipments under a similar letter of hypothecation, and that the Russo-Chinese Bank, by reason of its breach of duty in allowing Clarkson to take the flour represented by these shipments rendered itself liable to the National Bank of Commerce, and when the collection was made from Ginsburg the Russo-Chinese Bank was merely paying its own obligation to the National Bank of Commerce. And Short testified that the same arrangement was adopted by the Russo-Chinese Bank in the handling of the shipments represented by the amounts above named as in the "Hyades" shipment.

Counsel also at page 15 of the petition, criticize the opinion of this Court in commenting upon the failure of Mr. Ofsiankin to testify as to the letter of guaranty, and contend that there was nothing in the record that could advise Ofsiankin that the giving of a letter of hypothecation would be involved in this case. The deposition of Davidson (Rec., p. 185) shows that a letter of hypothecation was required by the Russo-Chinese Bank before consenting to the delivery of the flour, and states the contents of such letter of hypothecation. The plaintiff was advised by this deposition of the importance of having the testimony of Ofsiankin, the manager of the

bank, if it desired to contradict the testimony of Davidson; and the plaintiff cannot plead surprise at the introduction of such testimony. Moreover, the record shows that at the former trial the defendant demanded of the plaintiff the production of this letter of hypothecation, and it would seem that the testimony of the man in charge of the bank should have been produced, if it could have been produced, and the jury might have been impressed by the failure to produce this testimony, just as this Court was impressed by it.

On page 18 of the petition counsel refers to a statement. We desire to call the attention of the Court to the fact that Clarkson also testified that he had given instructions to his Port Arthur house not permit any consigned goods to be taken out of the warehouse without the production of the bills of lading, or the consent of the bank, which shows that Clarkson had in mind the fact that a custom existed for the bank to direct the delivery of consigned flour.

On page 19 of the petition counsel undertake to explain the failure on the part of the bank to produce a copy of the letter of hypothecation. We fail to see how the fact that the defendant had demanded the original of the letter of hypothecation more than



a year before the trial would excuse its non-production, even if defendant's counsel did say that he did not think the plaintiff would produce it, because counsel for plaintiff had said they did not have it.

Short testified that the Russo-Chinese Bank did take the letter of hypothecation, and the jury evidently believed him, and if the bank had such letter it was its duty to produce it, if it wished to escape the unfavorable inference that the jury may have placed upon its action in failing to produce it, or to account for its absence.

On pages 20 and 21 of the peitition the contention is made that Short testified that he did not know whether or not the "Hyades" flour had been sold prior to the time he left Port Arthur. This Court will remember that there were but six or eight thousand sacks of flour in the warehouse when the "Hyades" flour, consisting of 36,000 sacks, arrived. The aggregate of these two would make from 42,000 to 44,000 sacks. Short stated that ten or twelve thousand sacks had been sold after the arrival of the "Hyades" flour; that he could not tell whether the old flour was sold, or whether the "Hyades" flour had been sold. But it strikes us that this is wholly beside the question, because the evidence is con-

clusive, both on the part of Davidson and Short, and also the witnesses for the plaintiff, that all of the flour left in the Clarkson warehouse was sold to Ginsburg. Short's testimony is that there was no other flour than the "Hyades" flour and the six or eight thousand sacks that were in the warehouse upon the arrival of the "Hyades" flour.

Counsel, however, on pages 24 to 35 of the petition, contend that Davidson's testimony referred to an entirely different shipment of flour and that the flour which was sold Ginsburg was the flour which came on the "Pleiades," which arrived at Port Arthur on February 7th, 1904. It is true that Davidson was pretty positive in his testimony that he was referring to the flour that arrived on the 7th of February, whether by the "Hyades" or the "Pleiades" he was not positive. The fact is the "Pleiades" did arrive on the 7th of February with a shipment of flour; but the evidence also shows that Davidson was selling for Clarkson to Ginsburg a very large quantity of flour, and the testimony of Short shows that only 1,500 to 2,000 sacks of flour were unloaded from the "Pleiades" after her arrival on the 7th of February, and that he himself left on the "Pleiades" when she departed from Port Arthur. The jury

were evidently justified in reaching the conclusion that Davidson was mistaken as to the date of the arrival of the flour he claimed to have sold Ginsburg.

It was very strenuously contended before the jury that Davidson's testimony had no reference whatever to the "Hyades" flour; but the jury simply reconciled Davidson's testimony with that of Short. And Davidson's testimony could not have referred to any flour shipped by the "Pleiades," because only a small quantity of flour was ever unloaded from the "Pleiades;" and it seems to us that any reasonable man could only reach the conclusion that Davidson was mistaken in his testimony as to the date of the arrival of the flour covered by the draft in question. However, any discrepancy in the testimony is a matter entirely for the jury to pass upon.

Again, Davidson further testified (Rec., p. 189) as follows: "Q. What was the quantity of flour shipped by this steamer to Clarkson & Company from the Centennial Mill Company? A. Between 35,000 and 40,000 sacks."

This conclusively establishes the fact, just as the jury must have found, that Davidson's testimony referred to the shipment of between 35,000 and 40,-

000 sacks of flour made by the Centennial Mill Company, which was the only shipment of that size at or near the time about which he was testifying, and this shipment was on the "Hyades." And we think the jury were clearly right in reaching the conclusion that Davidson was merely mistaken as to the date of the arrival of the flour, the event having occurred several years prior to the time of his testimony.

Again, on page 29 of the petition, a portion of Davidson's testimony is quoted as follows:

"Q. Was any of the flour you attempted to sell to Ginsburg & Company part of the 'Hyades' flour?

A. The flour I sold to Ginsburg & Company formed a part of a shipment that arrived in Port Arthur on or about the 8th of February."

Yet he gave, as we have seen above, the quantity of flour that arrived, and the quantity conforms to the shipment that arrived by the "Hyades."

Counsel further contend that the Ginsburg transaction has nothing to do with this case. We do not agree with counsel in this contention. The proceeds of the flour sold to Ginsburg, to the extent of about 42,000 roubles, were received by the defendant bank, not on account of the payment of the "Hyades" draft, but in payment of the two drafts for

\$4,136 and \$16,155 above referred to; and it is important also in clearly demonstrating that the letter of hypothecation was acted upon by Clarkson & Company and the flour covered by such letter was actually sold in pursuance of such letter, which effectuated a complete conversion of the flour by the bank, even under counsels' own contention. And the flour was sold to Ginsburg with the assistance of the plaintiff bank and the effect of the transaction was that the Russo-Chinese Bank, with full knowledge, used the proceeds of the sale of the flour to Ginsburg to pay its own obligation to the National Bank of Commerce growing out of the two drafts for \$4,136 and \$16,155 respectively, and it conclusively appears that all of the "Hyades" flour was sold, and that all of the proceeds from its sale went into the Russo-Chinese Bank.

On page 37 of the petition an attempt is made to show that the 126,928 roubles paid by Clarkson & Company were in no part the proceeds of the sale of the "Hyades" flour. Counsel say that 79,000 roubles were paid by the bank to Clarkson & Company in Vladivostock, and that this would only leave in controversy 47,928 roubles. It was the contention of the defendant, among other things, in its answer,

that the Port Arthur Bank collected from Clarkson & Company the proceeds of the sale of the "Hyades" flour and applied it to the payment of the indebtedness of Clarkson & Company to itself.

The evidence of Mr. Short (Rec., pp. 151-152) shows that from the 1st of January, 1904, up to November 23, 1904, there had been deposited with the Russo-Chinese Bank at Port Arthur by Clarkson & Company 126,928 roubles. Of this amount 79,000 roubles, he testified, were transferred to Clarkson & Company at Vladivostock. But the evidence of Mr. Clarkson shows that he was indebted in a very large sum of money to the Russo-Chinese Bank, both at Port Arthur and at Vladivostock, and while the books of the bank at Port Arthur show that the money was transferred to Vladivostock for the account of Clarkson this does not seem important, because if it was transferred to the account of Clarkson at Vladivostock, the Vladivostock Bank, to which Clarkson was indebted, would receive the money and credit it upon what Clarkson owed, and the Russo-Chinese Bank at Port Arthur did therefore receive from Clarkson & Company, between the dates above mentioned, the full sum of 126,928 roubles and between the 25th of March and the 26th of June, 1904,



79,000 roubles were collected from Clarkson & Company and transferred to Vladivostock, undoubtedly to reduce Clarkson's indebtedness to the Vladivostock Branch.

To show the materiality of these collections we shall refer again briefly to the testimony of Short. He stated that at the time of the arrival of the "Hyades" flour there was only six or eight thousand sacks of flour in the Clarkson warehouse at Port Arthur, and other goods of the value of not exceeding 15,000 roubles. The value of the flour on hand upon the arrival of the "Hyades" at 2.50 roubles per sack would amount to about 15,000 roubles more. This, Short testified, was all the merchandise that Clarkson had on hand. When to this is added the amount of money collected from Ginsburg and the money taken by Davidson before the bank took hold of the Ginsburg matter and we have substantially a sum equal to the amount of money collected by the bank from Clarkson & Company between the dates mentioned by Mr. Short, and in order to produce this sum it is necessary to include the proceeds of the sale of the "Hyades" flour, which in itself was sufficient to warrant the jury in finding that the bank had received enough money from the proceeds of the

sale of the "Hyades" flour to have paid the draft in controversy in full.

Counsel on page 41 of the petition refer to the fact that this is an action upon an express contract. This is entirely different from the contention made by counsel upon the first trial of this case. There it was contended that it was not an action upon an express contract but was an action for money paid under mistake of fact; and this Court by deciding that it was an action for the recovery of money paid under mistake of fact established the law of the case, and counsel cannot now be heard to make the contention that it is an action upon an express contract.

But we contend that the plaintiff cannot recover either upon an express contract or for money paid under mistake of fact, and we refer to our former brief (page 25 and subsequent pages). We might say, however, that the jury were justified, even if it be treated as an action upon an express contract, in finding that the plaintiff had failed to make out its case, because it did not comply with the contract. It is true that the witness for the plaintiff testified that the original draft was mailed to the Seattle bank immediately after its protest, but the officers of the Seattle bank testified that they had never received

it, and the jury may have disbelieved the testimony of plaintiff's witness as to the mailing of this draft.

We might also add that if Short's testimony is true as to the giving of the letter of hypothecation the plaintiff cannot recover because the bank, by directing Clarkson, as the agent of the Steamship Company to deliver the flour to Clarkson, the merchant, certainly relieved the Steamship Company from any and all liability to the Seattle Bank for the delivery of the flour without the production of the documents. The Russo-Chinese Bank was the holder of the legal title to the documents and of the flour, and its direction to the Steamship Company to release the flour would certainly absolve the Steamship Company from liability to the Seattle Bank for the delivery of the flour without the production of the documents. The Russo-Chinese Bank was the holder of the legal title to the documents and of the flour, and its direction to the Steamship Company to release the flour would certainly absolve the Steamship Company from liability and would forever prevent the Seattle bank from recovering anything from the Steamship Company.

On page 42 of the petition the statement is made that no custom or usage could afford a presumption

that a party would violate his contract, and the contention is also made that for the bank to direct the delivery of the flour without the production of the bills of lading was an illegal and criminal action, and alleges that Short made the statement that it was a criminal act. What Short testified to was that it would be a criminal act for himself or Davidson, as managers of Clarkson & Company at Port Arthur to sell the flour covered by the bills of lading without the production of the bills of lading, or without procuring the consent of the bank. No statement was made by Mr. Short, or anyone else, that the Russo-Chinese Bank, the holder of the legal title to the bills of lading and the draft would be committing a criminal act in directing the Steamship Company to turn the flour over to Clarkson & Company, and the Steamship Company was fully protected in obeying the direction or the order of the holder of the bills of lading.

But assuming that counsel were correct in this argument that it would be a criminal act for the bank to direct the Steamship Company to turn over the flour to Clarkson & Company before the payment of the draft,—it would seem that this is an argument in favor of the defendant. It would hardly be

presumed that the bank would direct the Steamship Company to surrender goods without the production of the documents, unless the bank construed its letter of hypothecation as a payment of the draft.

The evidence clearly shows the existence of a custom in regard to the handling of drafts such as the one in question in the manner testified to by Mr. Short. Such custom certainly would not be legal upon the assumption that the bank treated and considered the letter of hypothecation as a payment of the draft.

On page 45 of the petition and subsequent pages, counsel again discuss certain instructions given by the trial court. The instructions complained of are as follows:

“1. As the agent for the owner it was obligated to account for the amount of the draft, to account for the security which the bill of lading constituted, and it cannot be excused from obligation to account by saying that the flour disappeared without its knowledge, and require the defendant in this case in order to fasten an obligation upon it, to prove that it was negligent.

“2. By virtue of these endorsements and transfers, the legal title to the draft and the documents and to the flour in question passed to and became vested in the Russo-Chinese Bank, and I instruct you that as a matter of law it was in the power of the

plaintiff to handle, control, sell and dispose of such flour in any way that was deemed expedient by the plaintiff.

“3. If you find from the evidence in this case that plaintiff permitted Clarkson Company to take over the flour under such an arrangement as the defendant claims with the stipulation that the plaintiff was the owner of the flour and with the agreement that Clarkson & Company would account to the plaintiff for the proceeds of the sale of the flour, then I instruct you that such action on the part of the plaintiff constitutes in law a payment of the draft in question and the plaintiff cannot recover and your verdict must be for the defendant.”

We discussed the first of these instructions in our original brief at pages 41 and 42, to which we refer, and we also refer to page 34 of said brief in this connection. We also refer to our supplemental brief, pages 2 to 5, and particularly refer to pages 11 to 24 of our original brief, as bearing upon these instructions and also refer to the authorities cited in said brief. We think, moreover, that the instructions were not erroneous and correctly stated the law. There can be no question but that the legal title to the documents, the draft and the flour was vested in the Russo-Chinese Bank; to all the world, except the defendant, it was the legal owner of the flour and the documents. Neither can it be successfully



urged that an agent who has security can allow the security to disappear without accounting for it in some way. This seems to us to be elementary. But counsel says that: "This could mean nothing other than that the plaintiff was required to produce either the money or the flour. It could not avoid liability, as the jury were told, by simply proving or showing that it had not possession of the flour and did not know where it was. Apparently, under these instructions, if this flour had been lost en route and never reached Port Arthur, still the Port Arthur bank would be liable."

We do not think the instruction of the Court is susceptible of any such interpretation. The evidence shows that the flour had arrived at Port Arthur; that the documents had arrived; that the bank had instructed the Steamship Company's agent to turn the flour over to Clarkson and had taken from Clarkson a letter of hypothecation, by which Clarkson agreed to sell the flour and account to the bank for the proceeds of the sale thereof, and the Court correctly advised the jury that the burden was upon the plaintiff to account for the flour under such conditions, if the jury found such conditions to exist; and we think that the Court was justified

under the evidence in instructing the jury that the taking of the letter of hypothecation and the delivery of the flour to Clarkson by directing the agent of the Steamship Company to turn it over to Clarkson, did amount to a payment of the draft.

Counsel objects to these instructions apparently for the reason that in a case of conversion of personal property it is for the jury to pass upon the value of the property. In this case, the uncontradicted evidence was that the value of the flour was at least equal to the amount of the draft. The witnesses for the plaintiff fixed the value of the flour at such sum. There was nothing for the jury to pass upon as to the value. It was admitted. The authorities which we cited in our former brief and heretofore referred to clearly show that these instructions correctly stated the law, and in view of the evidence as to the value of the flour, which was uncontradicted, we are unable to see how the plaintiff could have been injured or benefitted by the instructions, even though the jury had been called upon to pass upon the value of the flour.

Counsel say that if the instructions had been to the effect that the Russo-Chinese Bank would have been liable for the conversion to the extent of

the value of the flour, their objection would be untenable. Yet that is precisely the situation. There was no dispute in the evidence as to the value of the flour being in excess of the amount of the draft, and the defendant was asserting no claim to anything in excess of the value of the flour.

Counsel say that the plaintiff bank had the right to have the jury pass upon the extent of its liability and that the Court could not say as a matter of law that it was the face of the draft.

We have shown that the evidence was complete both as to the giving of the permission to Clarkson to sell the flour and the fact that Clarkson sold the flour under such permission. How has the plaintiff been injured by the instruction? Had the Court modified the instruction so as to require the jury to pass upon the value of the flour, there could have been no other result than that at which the jury arrived. It was perfectly manifest and palpable that the value of the flour was undisputed and was fixed by all of the witnesses at at least the amount of the draft. We think the instruction as given by the Court correctly stated the law, but even if it did not, the plaintiff has in no wise been prejudiced.

The Court had the right to have stated to the jury that the value of the flour was not disputed; that it was fixed, and upon the undisputed testimony showed that it was of the value, as we have stated. Moreover, the bank, by taking Clarkson's obligation to pay the amount of the draft out of the proceeds of the sale of the flour, itself fixed the value of the flour, because the evidence is that Clarkson agreed to pay the amount of the draft and to sell the flour and apply the proceeds of its sale to the payment of the draft.

On page 52 of the petition Counsel insist that, because the draft was accepted by Clarkson & Company, who then became the principal debtors, it was the duty of the bank to first sue Clarkson to recover from him if possible.

The evidence shows that Clarkson was heavily indebted to the bank itself and it is a fair inference that the defendant could not have recovered anything from Clarkson had it brought a suit upon the acceptance. But it would be monstrous, it seems to us, to impose any such duty upon the defendant bank and to require it to first sue Clarkson for the recovery of this money. The method of dealing with Clarkson by the defendant bank clearly shows that it

placed no reliance upon Clarkson's financial responsibility; it relied solely upon its security; it sent the draft with the bills of lading attached with directions not to deliver them except upon payment.

Now it appears that the Russo-Chinese Bank disregarded these instructions, and while it may not have surrendered the documents to the Steamship Company, it did what was equivalent thereto—it directed the agent of the Steamship Company to deliver the flour to Clarkson & Company. In other words, the Russo-Chinese Bank undertook to do by indirection that which the National Bank of Commerce had directed it under no circumstances to do. The defendant bank sought to hold its security for the payment of its draft, and sought to prevent the flour from passing into the hands of Clarkson & Company without the payment of the draft, and the Russo-Chinese Bank, in utter disregard of these instructions, if the testimony of Short is to be believed, and the jury evidently believed it, deliberately turned over the flour to Clarkson & Company and accepted Clarkson & Company's obligation to pay the draft. Upon what principle of law or of morals ought the defendant bank be required to proceed against Clarkson upon the acceptance.

We think that this contention of Counsel cannot be sustained for a further reason: When Clarkson accepted the draft, the Russo-Chinese Bank was the legal holder of it. By taking the letter of hypothecation from Clarkson it created a new obligation on the part of Clarkson to the Russo-Chinese Bank inconsistent with the acceptance of the draft in which the defendant bank was interested. As between Clarkson and the Russo-Chinese Bank Clarkson had the right to deal with said bank as the legal owner and holder of the draft and the security. This he did, and gave a new obligation to the Russo-Chinese Bank, agreeing to pay that bank the amount of the draft, and to sell the flour and account to the bank for the proceeds of its sale, to be applied upon the indebtedness created between Clarkson and the Russo-Chinese Bank. This procedure is clearly inconsistent with the acceptance of the draft and was in the nature of a novation, a new contract between Clarkson and the bank which nullified and superseded the contract made by his acceptance of the draft.

On page 53 of the petition counsel say that the loss of the flour to the defendant was a necessary element in the appropriation of the flour by the



Russo-Chinese Bank to its own use, or a necessary element in the conversion of the flour, and that there was no evidence of any acting on the part of Clarkson under the authority of the letter of hypothecation.

We think the evidence clearly shows what became of the flour and that the defendant never received any of it. Neither this Court, nor the jury, can nor could reach any other conclusion than that the great bulk of this flour was sold to Ginsburg and that the flour had been lost to the defendant, and that its value at least equaled the amount of the draft.

On page 56 and subsequent pages counsel object to the admission of certain testimony as to the custom of the bank in handling drafts, and stated that the question ought to have been limited to cases where the character of the draft was stated and the nature of the instructions accompanying it were also stated. There was nothing erroneous in the admission of such testimony. The question was broad enough to include the method of handling drafts generally as well as the handling of drafts such as counsel suggest, and the plaintiff had ample opportunity, which it utilized, to cross-examine the

witness Davidson as to just what he meant. The evidence was properly admissable. The weight and effect of it, however, was for the jury to pass upon.

We do not think there is any merit in the contention of counsel as to the admission of the testimony.

There is another matter, however, to which we wish to call the Court's attention. Counsel contend that there is no evidence that the draft in question had been paid, but we feel confident that this Court will take the same view of the matter that it did upon the former hearing, and will find that there is an absence of evidence showing actual payment. However, if the fact of payment should not be established to the satisfaction of this Court, still the evidence clearly shows that the plaintiff was in no wise injured. Viewing this action either as one upon an express contract, or one for the recovery of money paid under a mistake of fact, the burden of proof rests upon the plaintiff to show that the draft was not paid by Clarkson & Company to the Russo-Chinese Bank—the burden is upon the plaintiff to prove a negative. It must establish the fact of non-payment before it has any right to recover,

and it was within the province of the jury to have disbelieved the testimony of the plaintiff's witness as to the non-payment, even though such evidence was uncontradicted.

But, as we have shown, both in this brief and in our former briefs, an abundance of evidence was introduced tending to show the payment of the draft, from which the jury were fully justified in reaching the conclusion that it had been paid, just as this Court announced in its former decision.

Respectfully submitted,

KERR & McCORD,  
Attorneys for Defendant in Error.



No. 2182

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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RUSSO-CHINESE BANK

(a corporation),

*Plaintiff in Error,*

vs.

THE NATIONAL BANK OF COM-  
MERCE OF SEATTLE, WASH-  
INGTON,

*Defendant in Error.*

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## REPLY BRIEF OF PLAINTIFF IN ERROR ON REHEARING.

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By permission of the court granted at the hearing we file a reply to the brief of the defendant in error filed at the time of the argument and which we had had no opportunity of examining prior to the argument.

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### I.

THE INSTRUCTION (Record p. 228) THAT PERMISSION OF PLAINTIFF GIVEN CLARKSON TO TAKE OVER THE FLOUR UNDER THE ARRANGEMENTS STIPULATED CONSTITUTED IN LAW A PAYMENT OF THE DRAFT IS ERRONEOUS.

In the petition for rehearing (pp. 47-56) we urged three considerations as showing error in this

instruction. It was urged that the trial court had quite failed to distinguish between the obligation to pay and the flour given as security for that obligation; that it was of no importance to the Seattle Bank that the security disappeared if they were, nevertheless, able to realize upon the debt; it, of course, being borne in mind that Clarkson had accepted this draft, and that the bills of lading were accompanied by a bill of sale to Clarkson and Company.

In support of this instruction counsel for defendant in error at the argument and in his brief has urged (brief, p. 26) that

“The uncontradicted evidence was that the value of the flour was at least equal to the amount of the draft. The witnesses for the plaintiff fixed the value of the flour at such sum. There was nothing for the jury to pass upon as to the value. It was admitted. The authorities which we cited in our former brief and heretofore referred to clearly show that this instruction correctly stated the law, and in view of the evidence as to the value of the flour, which was uncontradicted, we are unable to see how the plaintiff could have been injured or benefited by the instructions even though the jury had been called upon to pass upon the value of the flour.”

It will be observed, therefore, that the only support which counsel has attempted to give to this instruction is that there was no dispute as to the value of the flour, and, therefore, that it was not necessary to submit the question of this value to the jury.



Were there no conflicting evidence upon the subject, still the question whether the value of the security lost, equaled or exceeded the face amount of the draft with interest was a question of fact which the plaintiff was entitled to have the jury pass upon.

In another portion of his brief, counsel has strongly urged that this court may not now consider the evidence at all, for the reason that the jury may have refused to follow it entirely and that the jury is not bound even by the unanimous statements of all the witnesses (brief, p. 33). If this reasoning be correct, then, although there were no testimony on the subject of value, or all that testimony were unanimous, still it was a question for the jury because they had the option of rejecting such testimony *in toto* if they saw fit.

But the evidence upon the subject is not free from contradiction.

Although, as noted, it is claimed by counsel that the witnesses for the *plaintiff* fixed the value of the flour, we have been unable to find in the record any evidence in behalf of plaintiff which refers to this subject, except the testimony of the witness Friedberg as follows (Record, p. 36):

“As far as I know during the siege of Port Arthur the price of flour was a little higher than before the outbreak of the war, but there was a lot of flour in the go-downs of the government, and no scarcity was felt of it. *I do not know the price of the flour.*”

On behalf of defendant we find only the following evidence:

Defendant's witness Short testified on direct examination (p. 152):

"Q. And do you know the market price of flour at the time you left there?

"A. It was selling from two forty to two sixty-five roubles.

"Q. A sack?

"A. A sack."

Defendant's witness Davidson testified on cross-examination (pp. 201-202):

"Q. And was not the market price of flour in Port Arthur at that time from 2.5 to 3. roubles per sack?

"A. There was no market price of flour at that time. The Russians were too busy saving their skins to think of establishing a definite price for edibles as is usual in cases of besieged ports."

and on pages 196-197:

" \* \* \* I left Chinwantau after having made arrangements with the Chinese Engineering & Mining Company to supply the fifty thousand tons of coal at eleven o'clock P. M. on the 8th of February, 1904. I arrived off of Port Arthur the following morning about ten o'clock. I was on a Russian steamer named 'Ninguta' which was denied admission and denied entrance into the inner harbor. The result of which was I was compelled to remain on board this steamer which was anchored between the Russian and Japanese fleets while the latter bombarded the former for about one hour. Some time after this the 'Ninguta' was allowed to enter, but I was denied permission to go ashore. On my arrival on the shore between four and five o'clock in the afternoon I was informed that Mr. Czechowitz left for Vladivostok by the

first train after the bombardment began with the Russian bookkeeper who had taken Mr. Short's place. The only other office man was a youngster by the name of Newhard and owing to his youth and utter incapacity and the fact that he was then in jail he was unable to render any assistance to me. From what I have since learned it would appear that Clarkson addressed a letter to me on the 30th of January, 1904, which letter he sent to Mr. Czechowitz at Port Arthur and which letter arrived during my absence in Tientsin. This letter notified me that Mr. Clarkson had made Mr. Czechowitz sole manager of the Port Arthur office and asked me to turn over all of the company's business to Mr. Czechowitz and agreed to pay me one month's salary after seven years' work. Mr. Czechowitz, however, it appears was too much concerned with his own safety to remain in Port Arthur to hand this letter over to me, and I not knowing of its existence undertook and did my best to protect the interests of the firm of Clarkson & Company during the eight trying days thereafter that I remained in that besieged port. Ultimately being compelled to leave I arrived in Shanghai about the 28th of February, 1904, and on the 29th of the same month, the next day after my arrival, was presented by Mr. A. C. Hunter of Shanghai with the letter from Clarkson dated the 30th of January, 1904. The original of this letter I have now shown the commissioner and ask that it be attached to and made a part of my deposition and marked exhibit A. It is dated 'Jan. 17/30/1904' ''.

And also pages 198-199:

"A. All I know about this shipment is that a steamer belonging to either the Boston Steamship Company or the Boston Towboat Company and called either the 'Hyades' or the 'Pleiades' arrived at Port Arthur on or about the 8th of

February, 1904, and while I was manager of the firm of Clarkson & Company at Port Arthur. Just when the steamer referred to arrived I am unable to give the precise date, as I was away from Port Arthur on her arrival. On my return to Port Arthur on the afternoon of the 9th of February, 1904, I saw the steamer in the harbor. I arrived after a bombardment by the Japanese fleet and after a considerable delay was able to go on shore, and when I arrived at the office of Clarkson & Company I was told that it was impossible to obtain coolies to continue the discharge of the steamer's cargo. It was too late then on that day to do anything other than to make some effort to protect that part of the cargo which had already been discharged. On the 10th of February, 1904, the captain through the first officer demanded of me as manager of the firm, Clarkson & Company, who were the agents of the steamer, that the steamer be allowed to leave the port, and I thereupon solicited the assistance of one of the managers of the Russo-Chinese Bank to accompany me to the admiral who acted as commander of the port to endeavor to arrange with him to give permission to allow the steamer to proceed on her voyage. The commander of the port asked me what cargo she had and I told him that it was impossible for me to say what part of her cargo had been discharged and what part to be discharged in as much as some of the lighters had undoubtedly been sunk by the Japanese shells and that a good deal of the cargo had unquestionably been stolen by his own sailors and the Russian soldiers and Chinese. After a good deal of talk he promised me that he would send a sufficient number of sailors on board of the steamer the following day to discharge the rest of the cargo destined for Port Arthur, after which he would give permission for the steamer to leave the port. On the following day a cer-

tain number of sailors were sent on board of the steamer and a certain part of the remainder of the cargo was discharged. What part of it is impossible for me to say, and then the steamer was allowed to leave, which she did, for Chefoo."

And also at pages 190-191:

"Q. What did you do upon arrival at Port Arthur in reference to this shipment of flour?

\* \* \* \* \*

"A. I was allowed to go on shore at Port Arthur between four and five o'clock in the afternoon of the 9th of February, 1904, and immediately upon my arrival on shore I went to the office of Clarkson & Company and there discovered that the most of my assistants were hiding in their homes and some of them had already ran away to Vladivostok. I was besieged by people who were anxious to get passage away from Port Arthur by the steamers for which Clarkson & Company acted as agents, and as soon as I had pacified them and told them there was no possibility of any steamer leaving Port Arthur I looked for the comprador and after a certain time, possibly an hour or more, succeeded in finding him and I then tried to make arrangements with the military and naval authorities to supply watchmen to guard the cargo as all of the employes of Clarkson & Company were absolutely worthless for that purpose. Neither the navy or any army departments would give me any assistance. I finally found two Russian civilians whom I engaged for that purpose. I want to state right here that I saw with my own eyes that afternoon a very considerable quantity of flour being stolen which it was impossible for me to prevent. The whole town was in a chaotic state and the people were, more particularly the Chinese, looting everything in sight."

The time to which Davidson refers was either February 8th or 9th, only three or four days after the time that Short left Clarkson's employment.

So far, then, as there being no conflict in the evidence as to the market value of flour in Port Arthur at the time in question, it clearly appears from the testimony of the two witnesses for the defendant that there was, to say the least, a direct conflict on the subject; Short fixing the value at a certain definite sum; and Davidson saying that it had no market value whatever, and stating pretty conclusive facts to substantiate his assertion.

It is to place the evidence in the most favorable light for the defendant to say that there is a conflict in the subject. There being such conflict it was not for the court to say that the value of the flour at the time equaled or exceeded the amount of the draft.

In urging the obvious incorrectness of this instruction we again refer to the fact that the exception taken to it specifically pointed out this alleged error (Exc. 7, p. 233).

The instruction to which the attention of the court is now directed (Record, p. 228) if erroneous must necessitate a reversal of the judgment, notwithstanding the special verdict, because it is directly concerned with the special verdict and doubtless was the authority under which the jury believed they were entitled to act when they reached their conclusion. By it the mere making of the arrangement referred to was said to "constitute in law a payment



of the draft in question". It mattered not that the arrangement was consummated or how much flour was sold by Clarkson. The *permission* given by plaintiff to Clarkson to take over the flour with the agreement on Clarkson's part to account to the plaintiff for the proceeds was definitely said to be a payment of the draft.

It is submitted that no satisfactory answer has been made by counsel either in his brief or his argument to this assignment of error.

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## II.

### A NOVATION WAS NEITHER ATTEMPTED NOR CONSUMMATED.

Throughout counsel's argument and brief there runs the suggestion that by this alleged unauthorized permission given Clarkson a novation was effected by which a new obligation was substituted for an existing one, and the Port Arthur branch substituted as the creditor of Clarkson in place of the Seattle Bank. It is indeed necessary to go to this extent to support the instruction of the court discussed in the preceding subdivision of this brief, and to establish not only that a new debt was created, but that the old one was extinguished.

The simple facts effectually prevent such a conclusion.

We take it to be the essential of any novation that either (1) a new obligation is substituted for an old one, *with intent to extinguish the old one*; or (2) the

substitution of a new debtor in place of the old one *with intent to release the latter*; or (3) the substitution of a new creditor in place of the old one *with intent to transfer the rights of the latter to the former*.

*California Civil Code*, Section 1531,  
which we believe states the general law upon the subject.

It is essential to a novation that the original debtor be discharged and that the substitute assume and be bound for the debt. There must concur the intervention of a new debtor accepted by the creditor for and in release of the original debtor.

*American Paper Bag Co. v. Van Nortwick*,  
52 Fed. 752;

*Jackson Iron Co. v. Negaunee Concentrating Co.*, 65 Fed. 298;

*Illinois Car etc. Co. v. Linstroth Wagon Co.*,  
112 Fed. 737.

There obviously was here no intent upon the part of any one to extinguish the old obligation of Clarkson, or to substitute a new debtor in place of Clarkson, or to make the Russo-Chinese Bank the creditor in place of the Seattle Bank. If such had been the intent of the parties then the principal obligation, to wit, the accepted draft of Clarkson would have been cancelled and returned to him with the assent of both the Russo-Chinese Bank and the Seattle Bank. But, instead of this being done, the opposite course was taken. Short testifies that the arrangement was made at the time that he accepted the

draft, viz., January 30, 1904 (Record pp. 140 and 20). It was not the intention to then extinguish the old obligation, or Short would not have accepted the draft, but on the contrary would have demanded that it be delivered to him cancelled.

When the draft matured, it was protested for non-payment and subsequently remailed to Seattle. Of course, if the parties had intended that this guaranty or new arrangement should take the place of the old debt this action would not have been taken. The retention of the draft creates a presumption which in the absence of counter-proof is conclusive to the effect that Clarkson was not released upon his original obligation, and that a new debtor was not substituted.

In a word, this alleged arrangement so frequently discussed in this case could amount to nothing more than a release of the *security* for the debt. There was not the slightest suggestion of any release, substitution or other change of the principal *obligation*. The Seattle Bank suffered no damage by the release of this flour, assuming that it was released, if Clarkson paid his draft. An action could not be maintained against the Port Arthur branch for this unauthorized act, unless the Seattle Bank could show damage thereby, and in order to show this damage it would be compelled to allege and prove that it was unable to collect the debt from Clarkson.

This question of whether or not a novation was had we think to be of signal importance in this case because it was evidently the theory of the trial judge

that a novation was effected. The instruction already referred to, that the mere acceptance of the guarantee and permission given Clarkson by the Port Arthur branch operated as a payment of the draft, i.e., extinguished the old obligation, is but another way of saying that a novation was consummated.

This difficulty is evidently foreseen by counsel for defendant in error for he attempts to show that the record discloses that Clarkson was financially unable to pay his draft. It is said in his brief (p. 28),

“The evidence shows that Clarkson was heavily indebted to the bank itself, and it is a fair inference that the defendant could not have recovered anything from Clarkson had it brought a suit upon the acceptance.”

In a direct action by the Seattle Bank against the Port Arthur branch for damages the plaintiff could not make out a case by simply showing that the draft was worthless because its acceptor had a large overdraft with the plaintiff bank.

To the contrary there is much evidence in this record that Clarkson was financially able to pay the draft, and that the Seattle Bank believed this to be so. Mr. Ostrander, a representative of the Centennial Mill Company, long in the Orient and present at Port Arthur a few days before the war broke out, testified (p. 135):

“I knew the firm of Clarkson & Co. from the spring of 1898. The Centennial Mill Company

did business with Clarkson & Co. from that time on to the extent of several hundred thousand dollars a year, all in flour. Shipments were made to Vladivostok, Port Arthur and Dalny. Dalny is about forty miles east of Port Arthur. Clarkson had a warehouse system in each place. I was in Port Arthur late in January and early in February, 1904, four or five days before the outbreak of the war. I was there on business of the Centennial Mill Company. Visited Clarkson & Co. at the time. The reputation of Clarkson & Co. commercially was first class as far as I could find out."

Short testified on direct examination for defendant (p. 149):

"Q. What was the financial reputation of Clarkson & Company's business at Port Arthur during the year 1903 and up to the outbreak of hostilities between Russia and Japan?

"A. Clarkson's financial standing in Port Arthur was all right. He always had sufficient money on his books and cargo in the go-downs to cover any liabilities that he might have."

and upon cross-examination (pp. 161-162):

"A. The suspicions of the Russo-Chinese Bank concerning Clarkson, I don't see why there should have been any. Clarkson was in—as far as his Port Arthur branch was concerned was in a better financial standing than it had been for a long time.

"Q. So far as you know, then, there was no reason why the Russo-Chinese Bank should not have assumed that Clarkson would pay these drafts when they became matured?

"A. Absolutely none.

"Q. So far as you know, there was no reason that the Russo-Chinese Bank should notify Seattle that there was anything unusual in this transaction, was there?

"A. Not that I know of.

"Q. And you know of no reason why any custom or usage prevailing at Port Arthur would have compelled the Russo-Chinese Bank to telegraph or write Seattle, do you?

"A. No, I don't."

Nor can support to the conclusion that a claim against Clarkson was valueless be obtained from the fact that Clarkson was indebted to the Port Arthur branch. This indebtedness was partly from the Vladivostok office and partly from the Port Arthur office, and whether or not it was any unusual indebtedness that was not fully secured in no wise appears. There is abundant testimony that Clarkson was engaged in very extensive business operations in both places, and it cannot be inferred that because at this time he happened to have an overdraft that he was insolvent. The strongest financial institutions are usually the largest borrowers.

This seems the proper place to again briefly refer to the statement in defendant's brief that because 126,928 roubles had been paid by Clarkson and Company to the bank between January 1st and November 23, 1904 (pp. 151-152), that the presumption may be legitimately indulged that a portion of this money went to pay the draft in question. But this argument fails to note the other side of the ledger showing that during the same period the bank had paid Clarkson and Company 79,000 roubles. There is nothing whatever to show that the payments by Clarkson had to do with this



draft or cargo of flour. To the contrary, there being substantial evidence that there were many other large financial transactions between the parties, there can be no presumption that this balance of 47,928 roubles was applied on this draft.

We refer again to the case of *Somervail v. Gillies*, 31 Wis. 152, fully quoted in our petition for rehearing (pp. 38-40).

We find no reference in counsel's brief to this case, or any dispute of the principle there annunciated, to wit, that the mere fact of the payment by one person to another is not even presumptive evidence of the payment of a particular debt until there is a further showing that there were no other dealings between the parties.

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### III.

**THE ONLY CLAIM MADE THAT THIS DRAFT WAS PAID IS THE PRESUMPTION FROM PAST TRANSACTIONS. THIS PRESUMPTION HAS NO LEGITIMATE APPLICATION TO THE CHANGED CONDITIONS AT PORT ARTHUR INCIDENT TO THE WAR.**

As frequently noted, there is no direct proof that any part of the "Hyades" flour was ever sold by Clarkson, or that any money was received by the Port Arthur branch therefor. The affirmative proof in this regard is entirely one of inference. It is said that because this arrangement was similar to those which had been made in the past between the same parties the presumption follows that the same

course was followed to the end and that the flour was in fact sold by Clarkson and the proceeds resulting therefrom received by the bank.

If it be remembered that the draft was not accepted until January 30th; that Short left Clarkson & Co. definitely on February 4th; and that hostilities commenced on the night of February 8th, it will be seen that there was a very brief interval of time in which this flour could have been sold and any light thrown thereon by Short.

Davidson left Port Arthur February 17th, and the conditions there are graphically shown by him in the excerpts from testimony already quoted. When, as he states, no market price of flour prevailed; when it was impossible to obtain coolies to discharge the steamer's cargo; when some of the lighters had been sunk by the Japanese shells and a good deal of the cargo stolen by the sailors and the Russian soldiers and the Chinese; when he states definitely that he himself saw a very considerable quantity of the flour being stolen which it was impossible for him to prevent, and that the whole town was in a chaotic state and people looting everything in sight—he brings before us a picture which discloses that the normal conditions of trade were emphatically not prevailing, and that it would be a forced conclusion to presume that this same flour was disposed of by Clarkson in the usual manner that had prevailed in times of peace. We urge that the defendant by its own showing has developed an impregnable defense to the ap-

plication of any presumption or inference from past dealings.

There is a presumption that a thing once proved to exist continues, but to that the important proviso must be added that it continues "as long as is usual with things of that nature". If conditions and surrounding circumstances have radically changed then the presumption of continuance no longer exists.

To assume that contracts made involving such large quantities of flour would be carried out in Port Arthur at the very time when conditions there were so chaotic would be as violent as the presumption that a contract requiring performance in the City of San Francisco within a few days succeeding the fire and earthquake of April, 1906, was then carried out simply because similar contracts had in normal times been so consummated.

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#### IV.

##### **THE FAILURE OF PLAINTIFF TO CALL OFSIANKIN AND TO PRODUCE THE WRITTEN AGREEMENT OF GUARANTEE.**

We have referred to this matter in the petition for rehearing (pp. 16-19), and quoted from the testimony of Friedberg (Record p. 33), denying positively that the Port Arthur Bank ever received possession of the flour or sold it to Ginsburg. We also refer to Friedberg's testimony at page 40 of the Record, in which he said:

“It (the bank) did not permit Clarkson & Co. to take possession of the flour. If they took possession of it, they did it on their own responsibility. It was not the bank’s business to look after the merchandise.”

and also the testimony of Drozdov (Record p. 64):

“But it (the bank) did not concern itself with the goods mentioned in those documents. And did not deliver or permit Clarkson & Co. to take possession of it. Clarkson & Co. appropriated the flour themselves on their own risk and responsibility.

“It was not the business of the bank to look after the goods and in fact, it did not know in what manner Clarkson & Co. made operations on these drafts.”

There was nothing in the pleadings or record in the case which could have placed the plaintiff at the trial upon notice that Short would claim that any such agreement was made with the absent Ofsiankin. The two employees of the Port Arthur branch, who had testified, viz., Friedberg, the joint manager, and Drozdov, the bookkeeper, had both testified positively that no permission was given Clarkson to take the flour. We urge, therefore, that no significance should be attached to the failure to secure the deposition of Ofsiankin because the plaintiff had no reason to suppose that he, any more than any other employee of the bank, would be the one with whom this arrangement would be claimed to have been made.

But it is said that the deposition of Davidson, on file some time before the trial, placed plaintiff upon

notice of this fact. We have again read the deposition of Davidson and fail to find evidence of any arrangement with Ofsiankin with reference to the flour of the "Hyades".

Davidson's testimony, so far as placing the plaintiff upon notice that any such arrangement as testified to by Short would be claimed, has the contrary effect; for his statement, many times repeated, was that *the bills of lading were always delivered by the bank when the letter of guarantee was given*, and he denies that Clarkson was ever permitted to sell the flour until after the bills of lading had been delivered. The plaintiff in this case knew, of course, that the bills of lading had not been delivered, and therefore was justified in believing that the special arrangement claimed was not made in the case of the "Hyades" flour. No deduction from Davidson's deposition could have placed the plaintiff upon any notice that the testimony of Ofsiankin was necessary.

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## V.

### THE GINSBURG TRANSACTION.

We shall not weary the court with further details on this matter, but refer to the petition for rehearing (pp. 25-36).

It is, however, reiterated by counsel that the flour sold to Ginsburg was a part of the "Hyades" cargo and not of the "Pleiades" cargo, and the testimony of Davidson (introduced by defendant) is

brushed aside with the simple statement that he was mistaken (brief p. 15). There is no possibility that Davidson could have been mistaken when he said that the flour he sold Ginsburg was a part of the shipment that arrived at Port Arthur on or about the 8th day of February, 1904 (Record p. 204). The reason that he cannot be mistaken on this subject is that Davidson was absent from Port Arthur when the "Hyades" draft was presented to Short. He returned to Port Arthur on the afternoon of the 9th of February. He states that he saw the steamer in the harbor, and this must have been the "Pleiades" because the "Hyades" had left Port Arthur on her homeward voyage on January 22, 1904 (Record p. 122).

Davidson had much intimate and detailed work to do with the cargo of the vessel that he saw in the harbor by securing protection from the Admiral and a sufficient number of sailors to discharge the cargo. He states that

"on the following day a certain number of sailors were sent on board of the steamer and a certain part of the remainder of the cargo was discharged. What part of it is impossible for me to say, and then the steamer was allowed to leave, which she did, for Chefoo".

It was flour from this cargo, which Davidson thus so intimately identifies, that was sold to Ginsburg. As noted, Davidson does not know how much flour was landed by the "Pleiades", but it was evidently a considerable amount since out of it he



claims to have made the Ginsburg sale and some was looted.

It would seem also a sufficient answer to this Ginsburg claim that the defendant Seattle Bank did actually receive \$20,291.20 out of a total of \$33,838.38, and that the difference was deposited by Clarkson with instructions to apply it to his general account. After these uncontradicted facts there is no play for any presumption that the Seattle Bank suffered any loss from the Ginsburg sale.

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## VII.

### SUMMARY.

So many briefs and arguments have been made in this case that to avoid as far as possible confusion, we beg to summarize our contentions:

1. The special verdict of the jury is not conclusive because (a) it is founded upon an erroneous instruction (Record p. 228), and (b) upon errors in the admission of testimony to the effect that the draft was paid (petition for rehearing p. 58), and (c) because there is no direct evidence whatever in this case that this draft was ever paid in whole or in part, and the agreement for the release of the security was not such payment, and (d) because under the extraordinary conditions existing at Port Arthur there can be no inference or presumption that the agreement for the sale of the flour by

Clarkson was carried out and the proceeds resulting therefrom deposited in the Port Arthur branch.

2. There were errors in the admission and rejection of testimony which were directly concerned with the evidence bearing upon the payment of the draft, and such rulings, therefore, are not cured by the special verdict because *non constat* it may have been this erroneous testimony upon which the jury based its verdict.

3. The special verdict not being conclusive the court may re-examine the instructions as to the duty of the Port Arthur branch concerning the flour, (see brief for plaintiff in error pp. 12-36) and also the evidence on custom or usage (brief pp. 37-40).

4. Under the first decision of this court in this case, plaintiff is entitled to recover either upon an express or implied contract. The conditions upon which the Seattle Bank expressly agreed to repay this money have been fully complied with, and since these were the only conditions attached plaintiff is now entitled to its money.

Respectfully submitted,

T. L. STILES,

DORR & HADLEY,

CHICKERING & GREGORY,

*Attorneys for Plaintiff in Error.*

United States  
Circuit Court of Appeals

For the Ninth Circuit.

---

DAN LOTT,

Plaintiff in Error,

VS.

UNITED STATES OF AMERICA,

Defendant in Error.

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Transcript of Record.

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Upon Writ of Error to the United States District Court of  
the Territory of Alaska, Division No. 1.

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**FILED**

DEC 23 1912



No. 2201

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United States  
Circuit Court of Appeals

For the Ninth Circuit.

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# INDEX TO PRINTED TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Counsel for Defendant and Plaintiff in Error.

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*In U. S. District Court in and for the District of Alaska, Division No. One, at Ketchikan.*

No. —.

THE UNITED STATES OF AMERICA,

Plaintiff and Defendant in Error,

vs.

DAN LOTT,

Defendant and Plaintiff in Error.

**Praeceptum for Record.**

To the Clerk of said Court:

You are hereby respectfully requested to include in your return herein to the Circuit Court of Appeals in and for the 9th Circuit, with the original writ of error herein, a certified copy of the transcript on appeal from commissioner's court, the complaint and the entries in the minutes as to the arraignment of defendant, his plea, the demurrer, judgment on demurrer, the impaneling of the jury, all the proceedings of the trial, as in the minutes recorded, including the verdict, motion for a new trial and order overruling same, and the judgment of conviction and sentence, also copies of the cost bond, on writ of

4      *Dan Lott vs. United States of America.*

[Subpoena.]

*United States Commissioner's Court, for the District of Alaska, at Ketchikan.*

United States,

District of Alaska,—ss.

The President of the United States of America to  
C. Ford and John Erickson, Greeting:

You are hereby commanded to appear before the Commissioner's Court of the United States, for the District of Alaska, at Ketchikan, in said District, on Tuesday, the 12 day of Dec., A. D. 1911, at 10 o'clock A. M. of that day, to testify on behalf of United States vs. Dan Lott.

HEREOF FAIL NOT.

WITNESS my hand and seal this 11 day of Dec.,  
A. D. 1911.

[Seal]

E. S. STACKPOLE,  
United States Commissioner.

United States,

District of Alaska,—ss.

I certify that I received the within subpoena on the 11 day of Dec., 1911, and served the same on the 11 day of Dec., 1911, by reading and showing the original, and delivering a ticket containing its substance to the within named C. Ford and John Erickson, personally.

H. L. FAULKNER,  
U. S. Marshal.

By J. H. Davies,  
Office Deputy U. S. Marshal.

[Endorsed]: No. ——. In the United States Commissioner's Court for the District of Alaska, at

Ketchikan. In the United States vs. Dan Lott. [5]  
Subpoena. Returned and filed the 11 day of Decem-  
ber, 1911. E. S. Stackpole, U. S. Commissioner. [6]

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*United States Commissioner's Court for the District  
of Alaska, First Division, Precinct of Ketchikan.*

THE UNITED STATES,

vs.

DAN LOTT,

Defendant.

**Commitment.**

Inciting Another to Commit Crime.

IN THE NAME OF THE UNITED STATES OF  
AMERICA.

To the United States Marshal or Any Deputy:

An order having this day been made by me that  
Dan Lott be committed for trial in a criminal action  
for the crime of inciting another to commit crime,  
you are hereby commanded to receive him into your  
custody, and detain him accordingly, or until he is  
otherwise legally discharged.

Dated at Ketchikan, District of Alaska, this 9 day  
of Dec., A. D. 1911.

[Seal]

E. S. STACKPOLE,

United States Commissioner and Ex-officio Justice of  
the Peace, Residing at Ketchikan.

United States of America,

District of Alaska,

Division No. 1,—ss.

I hereby certify that I received the within Com-  
mitment on the 9 day of Dec., 1911, and executed the

same on the 9 day of Dec., 1911, by delivering the within named defendant to the jailer at the U. S. jail at Ketchikan, Alaska.

H. L. FAULKNER,  
U. S. Marshal.

By J. H. Davies,  
Office Deputy U. S. Marshal.

[Endorsed]: No. ——. In the United States Commissioner's Court for the District of Alaska, First Division, at Ketchikan. The United States [7] vs. Dan Lott. Commitment. Returned and filed the — day of —, 190—. —, U. S. Commissioner and Ex-officio Justice of the Peace. [8]

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**Warrant.**

IN THE NAME OF THE UNITED STATES OF  
AMERICA.

To the United States Marshal of the District of  
Alaska, or His Deputy, Greeting:

Information on oath having been this day laid before me that the crime of inciting another to commit a crime has been committed, and accusing Dan Lott thereof, you are therefore commanded, forthwith, to arrest the above-named Dan Lott and bring him before me at Ketchikan, Alaska, or in case of my inability to act, before the nearest and most accessible Magistrate.

Dated at Ketchikan, Alaska, this 9th day of  
December, 1911.

[Seal]

E. S. STACKPOLE,  
United States Commissioner.



United States of America,  
District of Alaska,—ss.

I, H. L. Faulkner, certify that the within warrant came into my hands on the 9 day of Dec., 1911, and that I executed the same on the 9 day of Dec., 1911, by taking the within named Dan Lott into my custody and now produce him in court this 9th day of Dec., 1911.

H. L. FAULKNER,  
U. S. Marshal.  
By J. H. Davies,  
Deputy U. S. Marshal.

[Endorsed]: No. ——. In the U. S. Commissioner's Court for the District of Alaska, at Ketchikan. In the United States vs. Dan Lott. Warrant. Returned and filed the 9 day of December, 1911. E. S. Stackpole, U. S. Commissioner and Ex-officio Justice of the Peace. [9]

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The United States of America,  
District of Alaska,  
Division No. 1,—ss.

*In the Commissioner's Court for the District of  
Alaska, Division No. 1.*

No. —.

UNITED STATES,  
vs.  
DAN LOTT.

**Special Venire.**

To the United States Marshal Within and for the  
District of Alaska, Division No. 1, or to Any of  
His Deputies, Greeting:

AND HEREOF FAIL NOT.

[Se2] F. S. STACKPOLE

[Seal] E. S. STACKPOLE,  
Commissioner and Ex officio Justice of the Peace

I hereby certify that I received the within Special

Venire at 4 o'clock on the 11 day of December, 1911.

and served the same in the Division aforesaid on the

12 day of December, 1911, by summoning the follow-

ing named persons in accordance therewith: [10]

S. L. Myers. J. B. VanSice. D. H. Delzelle.

George Morrison. C. M. Taylor. Chester Smith.

Osborn Williams. John Raber. W. L. Polson.

Charles Deppe. J. H. Wall. F. S. Burkhart Ex.

G. F. Rounsefell.

Dated Ketchikan, Alaska, December 12, 1911.

H. L. FAULKNER,

U. S. Marshal.

By J. H. Davies,

Office Deputy.

[Endorsed]: In the Commissioner's Court for the District of Alaska, Division Number 1. No. ——. United States vs. Dan Lott. Special Venire. Returned and filed Dec. 12, 1911. E. S. Stackpole, Commissioner.

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United States of America.

District of Alaska.

*In the Commissioner's Court of the United States  
for the District of Alaska, Division Number  
One, Ketchikan, Alaska.*

December, 12th, 1911—Term, 19——.

THE UNITED STATES OF AMERICA,

vs.

DAN LOTT.

**Verdict [in Commissioner's Court].**

We, the jury empaneled and sworn in the above-entitled cause, find the defendant guilty as charged in the complaint.

GEO. F. ROUNSEFELL,

Foreman.

[Endorsed]: No. ——. In the United States of America vs. Dan Lott. Verdict. Returned and filed Dec. 12, 1911. E. S. Stackpole, Commissioner.  
[11]

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*In the Commissioner's Court at Ketchikan, Alaska.*

UNITED STATES OF AMERICA

vs.

DAN LOTT.

**Notice of Appeal [From Commissioner's Court].**

To R. V. Nye, Assistant U. S. Attorney.

Sir: You are hereby notified that the defendant in the above-entitled cause will appeal from the judgement of the Court given herein on the 13th day of December, 1911.

Respectfully,

KAZIS KRAUCZUNAS,

Attorney for the Defendant.

Dated at Ketchikan, Alaska, December 13, 1911.

Service of copy of above notice admitted this 13th day of December, 1911.

ROY V. NYE,

Asst. U. S. Atty.

[Endorsed]: United States vs. Dan Lott. Notice of Appeal. [12]

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**[Statement of Proceedings in Commissioner's Court].**

*In the United States Commissioner's Court for the District of Alaska, Division No. 1, Precinct of Ketchikan.*

UNITED STATES

vs.

DAN LOTT.

“Inciting Another to Commit Crime.”

On Dec. 9th, 1911, complaint sworn to by C. Ford, warrant issued duly returned, defendant duly arraigned and refused to plead, and was committed for trial.

On Dec. 11, 1911, comes now K. Krauczunas, attor-

ney for deft. and demands trial by jury; cause continued to Dec. 12, 1911; venire and subpoena issued.

On Dec. 12th, 1911, cause came on regularly for trial, present defendant with his attorney, R. V. Nye, Asst. United States Attorney. The following named citizens were accepted as jurors, to wit: S. L. Myers, Geo. Morrison, Osborn Williams, Chas. Deppe, J. B. Van Sise, C. M. Taylor, John Raber, J. W. Wall, D. H. Dalzelle, W. L. Polsen, Ed Grothjan and G. F. Rounsfell. The following witness sworn and examined on the part of the United States: C. Ford, John Erickson, F. E. Hagler, J. H. Davies and H. M. Stackpole. Argument by counsel and case submitted to the jury, who returned unanimous verdict of "Guilty." Judgment, Deft. fined \$50 and cost.

On Dec. 13, 1911, attorney for defendant served notice of appeal on R. V. Nye, Asst. U. S. Atty. Original, with proof of service on file herein. Undertaking on appeal given, with Geo. F. Rounsfell and J. F. Capp, as surities; proceedings not stayed thereby.

Bail bond in the sum of \$100 furnished, with Geo. Rounsfell and N. F. Zimmerman surities. Deft. released. Proceedings stayed.

[Seal]

E. S. STACKPOLE,

Commissioner. [13]

United States of America,  
District of Alaska,—ss.

I hereby certify that the foregoing is a true statement of the proceedings had in the above-entitled matter.

E. S. STACKPOLE,

Commissioner.

[Endorsed]: No. 264-K. B. In the District Court of the United States for the District of Alaska, Div. No. 1. United States vs. Dan Lott. Transcript. Filed December 15, 1911. E. W. Pettit, Clerk. By E. S. Stackpole, Deputy. [14]

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*In the District Court for the District of Alaska,  
Division No. 1, at Ketchikan, Alaska.*

264-K. B.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DAN LOTT,

Defendant.

**Demurrer.**

Comes now the above-named defendant, Dan Lott, by his attorney, Kazis Krauczunas, and demurs to the complaint on file herein, and for cause of demurrer states:

That said complaint does not state facts sufficient to constitute a crime as against this defendant or any crime whatsoever; that the facts stated in said complaint do not constitute a crime of any name, nature or kind under the laws of the District of Alaska, as against this defendant.

KAZIS KRAUCZUNAS,  
Attorney for Defendant.

[Endorsed]: Filed May 9, 1912. E. W. Pettit, Clerk. By H. Malone, Deputy. [15]



*In the District Court for the District of Alaska,  
Division Number One, at Ketchikan.*

No. 264—K. B.

UNITED STATES

vs.

DAN LOTT.

**Order Overruling Demurrer.**

On this day this matter coming on regularly for hearing upon the demurrer of defendant to the complaint herein, Assistant United States Attorney R. V. Nye appearing for the Government and Kazis Krauczunas, Esquire, appearing for defendant; and after argument by respective counsel and the Court being fully advised in the premises, said demurrer is by the Court overruled; to which ruling defendant is allowed an exception.

Dated Thursday, May 9, 1912.

THOMAS R. LYONS,  
Judge. [16]

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*In the District Court for the District of Alaska,  
Division Number One, at Ketchikan.*

No. 264—K. B.

UNITED STATES

vs.

DAN LOTT.

**Trial.**

Now on this day this cause comes on regularly for trial on an appeal from the Commissioner's Court

Assistant United States Attorney H. H. Folsom appearing for the Government, and the defendant being present in court, in person and represented by his attorney, Kazis Krauczunas, Esquire; and both parties announcing their readiness for trial, the following proceedings are had, to wit:

George Sickles, Fred Barthold, K. J. Johanson, A. E. Walker, Edward Brown, Fred G. Gardner are selected and sworn as jurors to try the issues in this cause. And it appearing that the regular panel of petit jurors is exhausted and the trial panel is incomplete, it is ordered that the Clerk issue a special venire, addressed to the United States Marshal and returnable at two o'clock P. M. to-day, to summon from the body of the District, and not from the bystanders, ten (10) men qualified as jurors to complete the panel herein.

Thereafter said Marshal returning said venire into Court the following persons, to wit:

George Stevens, John Schoenbar, J. T. Jones, Jr., C. C. Babbage, E. E. Morgan, D. G. Newell, are selected as jurors; and the trial panel being complete and being accepted by both parties hereto, the jury is duly sworn to try the issues in this cause.

Whereupon the rule is invoked and all witnesses are excluded from the courtroom while not testifying, and after statements by respective counsel to the jury, the following named witnesses, [17] to wit: C. Ford, John Erickson, Wm. H. Lewis and E. Ludecker, are duly sworn and testify for and on behalf of the Government, and the Government rests its case.

Thereupon Richard Bushell, Jr., M. A. Mitchell and Dan Lott, the defendant herein, are duly sworn and testify for the defense, and defendant rests his case.

Whereupon the further trial of this cause is continued to ten o'clock A. M. to-morrow, and the jury herein is excused until said day and hour.

Dated Monday, May 13, 1912.

THOMAS R. LYONS,  
Judge. [18]

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*In the District Court for the District of Alaska, Division Number One, at Ketchikan.*

No. 264—K. B.

UNITED STATES

vs.

DAN LOTT.

**Trial Continued.**

Now, on this day, the trial of this cause comes on again regularly for trial; comes the United States Attorney and comes likewise the defendant into court, being present in person and being represented by his attorney, Kazis Krauczunas, Esquire; come likewise the jury heretofore impaneled and sworn herein, and the said jury being called and each answering to his name, the following proceedings are had, to wit:

Whereupon defendant is recalled and further testifies in his own behalf; thereupon F. J. Hunt is duly sworn and testifies as a witness for the defendant, and the defense rests.

Thereupon S. Ford is recalled and testifies for the Government in rebuttal, and the prosecution rests.

And after argument by counsel for the plaintiff and counsel for the defendant, the jury being duly instructed by the Court as to the law in the premises, retire in charge of their sworn bailiff for deliberation. And thereafter the jury, returning into court in charge of their sworn bailiff, and being called and each answering to his name, present through their foreman their verdict, which is in words and figures as follows, to wit:

“United States of America,  
District of Alaska.

*In the District Court of the United States for the  
District of Alaska, Division Number One.*

[19]

SPECIAL KETCHIKAN MAY TERM, 1912.  
THE UNITED STATES OF AMERICA

vs.

DAN LOTT,

Defendant.

**Verdict [in U. S. District Court].**

We, the jury empaneled and sworn in the above-entitled cause, find the defendant guilty as charged in the complaint.

D. G. NEWELL,  
Foreman.”

And said verdict is ordered filed and entered by the Clerk, all special veniremen are excused for the term and the regular panel of petit jurors is excused

until 2 o'clock P. M. to-day.

Dated Tuesday, May 14, 1912.

THOMAS R. LYONS,

Judge. [20]

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**[Motion to Set Aside Verdict, for a New Trial and  
for Arrest of Judgment.]**

*In the United States District Court for the District  
of Alaska, Division No. 1, at Ketchikan, Alaska.*

264-K. B.

THE UNITED STATES OF AMERICA

vs.

DAN LOTT.

Comes now the defendant above named and moves the Court that the verdict rendered and entered herein on the 14th day of May, 1912, be set aside and a new trial granted herein, and also moves for arrest of judgment for the following causes materially affecting the rights of said defendant, to wit:

1. Irregularities in the proceedings of the prosecution and the Court: The trial Court erred by not instructing the jury to disregard the statement of the prosecuting attorney to the jury in his opening statement that the defendant had been tried and convicted for the same crime in the commissioner's court, and in substance, that this trial was an appeal from said verdict, to which objection was taken at the time by the defendant, and the Court stating at the time that the jury would be instructed on that point, which the Court failed to do and which undoubtedly effected the trial jury and caused the verdict of guilty to be rendered.

2. Insufficiency of evidence to justify the verdict and that it is against the law as follows:

(a) As to the evidence: The evidence failed to show that the defendant solicited or incited the complaining witness to commit the crime of *purchasing* liquor to an Indian. [21]

(b) As to the law: The fact having been established by the evidence that there was interposed between the alleged solicitation on the part of the defendant the proposed sale of intoxicating liquor by the complaining witness, the resisting will of the latter, who testified not only not having had any intention of purchasing the liquor, but by deceit obtained 75 cents from the defendant, by urging said defendant to give the complaining witness 75 cents for the sole purpose of reporting the alleged violation to the United States marshall. That said complaining witness had no intention whatsoever to procure the liquor.

Dated May 15, 1912.

KAZIS KRAUCZUNAS,

Attorney for Defendant.

Ketchikan, Alaska.

[Endorsed]: Filed 10 A. M. May 15, 1912. E. W. Pettit, Clerk. [22]

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*In the District Court for the District of Alaska, Division Number One, at Ketchikan.*

No. 264-K. B.

UNITED STATES

vs.

DAN LOTT.



**Order [Overruling Motion for a New Trial, etc.].**

Now, on this day, this cause coming on for hearing upon the motion of defendant for a new trial, the plaintiff being represented by Assistant United States Attorney H. H. Folsom, and the defendant being represented by Kazis Krauczunas, Esquire, after argument by counsel, and the Court being fully advised in the premises, it is ordered that said motion be, and the same is, hereby overruled; to which ruling of the Court an exception is allowed. And the time for pronouncing judgment herein is fixed at ten o'clock A. M. to-morrow.

Dated Wednesday, May 15, 1912.

THOMAS R. LYONS,  
Judge. [23]

---

*In the District Court for the District of Alaska,  
Division Number One, at Ketchikan.*

No. 264—K. B.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DAN LOTT,

Defendant.

**Judgment and Sentence.**

Comes now H. H. Folsom, Assistant United States Attorney; comes also the defendant in person and represented by his counsel, Kazis Krauczunas, Esquire; and the defendant having on a former day of this term been by a jury convicted of the crime of

“soliciting and inciting another to commit the crime of furnishing liquor to an Indian,” as charged in the complaint; and this being the time set for sentence, defendant is asked by the Court if he has anything to say why the judgment and sentence of the Court should not now be pronounced against him, and giving no legal excuse in that behalf;

It is now, therefore, the JUDGMENT and SENTENCE of the Court that you, Dan Lott, pay a fine of Seventy-five Dollars (\$75.00), without costs, and that you be committed to the custody of the United States Marshal until such fine is fully paid and discharged, at the rate of one (1) day for each Two Dollars (\$2.00) of said fine.

Done in open court this 16th day of May, 1912.

THOMAS R. LYONS,

District Judge.

[Endorsed]: Entered Court Journal No. L. L. 3, page 93-94. Filed May 16, 1912. E. W. Pettit, Clerk. By H. Malone, Deputy. [24]

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*In the United States District Court in and for the  
District of Alaska, Division No. 1, at Ketchikan,  
Alaska.*

No. 264-K. B.

AT LAW.

DAN LOTT,

Plaintiff,

against

UNITED STATES OF AMERICA,

Defendant.

**Petition for Writ of Error.**

Comes now the plaintiff, Dan Lott, and says that on the 16th day of May, 1912, judgment in this case was entered by this Court in favor of the defendant and against this plaintiff, by which said judgment plaintiff was aggrieved, in that in said judgment and the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of this plaintiff, all of which will appear more in detail from the assignment of errors filed with this petition. Wherefore, plaintiff prays that a writ of error may issue to the United States Circuit Court of Appeals for the Ninth Circuit for the correction of the errors complained of, and that a duly authenticated transcript of the record, proceedings and papers herein may be sent to said Circuit Court of Appeals.

KAZIS KRAUCZUNAS,

Attorney for Plaintiff.

Dated 17th day of May, 1912.

[Endorsed]: Filed May 17, 1912. E. W. Pettit,  
Clerk. [25]

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**[Order Allowing Writ of Error, etc.]**

*In the United States District Court in and for the  
District of Alaska, Division No. 1, at Ketchikan,  
Alaska.*

No. 264—K. B.

UNITED STATES OF AMERICA

vs.

DAN LOTT.

Order allowing writ of error upon motion of Kazis Krauczunas, attorney for the defendant, and upon

filing of petition for writ of error and assignment of errors, it is ordered that a writ of error. be and hereby is allowed to be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit. The proceedings, verdict and judgment heretofore entered and had herein in accordance with the laws in such cases made and provided and the practice of the Court.

Done in open court this 17th day of May, 1912.

THOMAS R. LYONS,  
Judge.

[Endorsed]: Entered Court Journal No. L. L. 3, page 96. Filed May 17, 1912. E. W. Pettit, Clerk.  
[26]

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*In the Commissioner's Court at Ketchikan, Alaska.*

UNITED STATES OF AMERICA

vs.

DAN LOTT.

**Undertaking for Bail.**

A judgment having been given on the 16th day of May, 1912, whereby Dan Lott was condemned to pay the sum of Seventy-five Dollars (\$75.00), and he having appealed from said judgment and been duly admitted to bail in the sum of Two Hundred & Fifty (\$250.00) Dollars,—

We, Domianus Maskevicius, of Ketchikan, Alaska, and N. F. Zimmerman, of the same place, hereby undertake that the above-named Dan Lott shall in all respects abide and perform the orders and judgments of the Appellate Court upon the ap-

peal, or if he fail to do so in any particular, that we will pay to the United States the sum of Two Hundred & Fifty (\$250.00) Dollars.

D. MASKEVICZIUS. [Seal]

N. F. ZIMMERMAN. [Seal]

United States of America,  
District of Alaska,  
First Division,—ss.

Domianus Maskeviczius and N. F. Zimmerman, being first duly sworn, each for himself deposes and says: That he is a resident within the District of Alaska, that he is not a counsellor or attorney, marshal, clerk of any court, or other officer of any court, and that he is worth the sum of Two Hundred & Fifty (\$250.00) Dollars, exclusive of property exempt from execution, and over and above all just debts and liabilities.

D. MASKEVICZIUS.

N. F. ZIMMERMAN.

Subscribed and sworn to before me this 17th day of December, 1912.

[Notarial Seal] KAZIS KRAUCZUNAS,  
Notary Public. [27]

The above bond is hereby approved this 17th day of May, 1912.

THOMAS R. LYONS,  
Judge.

[Endorsed]: 264—K. B. In the District Court for the District of Alaska, Div. No. One, at Ketchikan. United States vs. Dan Lott. Bond on Appeal. Filed May 17, 1912. E. W. Pettit, Clerk. [28]

*United States District Court in and for the District  
of Alaska, Division No. 1, at Ketchikan, Alaska.*

No. 264—K. B.

DAN LOTT

vs.

THE UNITED STATES OF AMERICA.

**Assignment of Errors.**

Comes now the above-named defendant, by Kazis Krauczunas, his attorney, and says that in the record and proceedings in said United States District Court, in the above-entitled action, and also in the giving of judgment in said action, there is manifest error in this, to wit:

In overruling the defendant's demurrer made in due time, for the reason that the facts stated in said indictment or complaint did not constitute a crime in this:

1. That section 218, Alaska Criminal Code, Part 1, does not create common-law crimes. That the common law of England does not apply to Alaska in so far as to create common-law crimes not expressly designated by law.

2. That solicitation by an Indian to purchase intoxicating liquor does not constitute a crime under any law.

By reason of and for errors of law occurring in the trial and duly excepted to by the defendant, which said alleged errors are the same specified in assignments 1 and 2, to which the defendant's council duly excepted, and the defendant prays that the judg-



ment as aforesaid as rendered against him in said court for the errors aforesaid may be reversed, cancelled, and altogether held for naught, and that more especially the judgment of conviction and sentence of the defendant to \$75.00 fine may be reversed, cancelled, and altogether held for naught, and that said defendant [29] be restored to all things which he has lost by occasion of said judgment.

KAZIS KRAUCZUNAS,

Attorney for Defendant,

Ketchikan, Alaska.

Dated 16th day of May, 1912.

[Endorsed]: Filed May 17, 1912. E. W. Pettit,  
Clerk. By H. Malone, Deputy. [30]

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**Writ of Error.**

THE UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to  
the Honorable Judge of the U. S. District Court  
in and for the District of Alaska, Division No.  
One, Greeting:

WHEREAS in the record and proceedings and also in the rendition of the judgment of a plea in that certain prosecution which is in said court before you, at the special May, 1912, term thereof, between the United States of America, as plaintiff below and now defendant in error, and Dan Lott, as defendant below and now plaintiff in error, a manifest error hath happened to the great damage of said Dan Lott, as by his complaint appears.

We, being willing that error, if any hath been,

should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then and under your seal, distinctly and openly, you send the record and proceeding aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the said record and proceedings aforesaid in the city of San Francisco, filed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, on or before the 15th day of November, 1912, to the end that the record and proceedings aforesaid being inspected, the United States Circuit Court of Appeals may cause further to be done therein, to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable EDWARD D. WHITE Chief Justice of the Supreme Court of the United States, this 16th day of October, 1912.

Issued at my office in Ketchikan, Alaska, with the seal of the United States District Court, in and for the District of Alaska, [31] Division No. One, and dated as aforesaid.

[Seal]

E. W. PETTIT,

Clerk U. S. District Court in and for the District of Alaska, Division No. One.

By \_\_\_\_\_,  
Deputy.

Allowed by

THOMAS R. LYONS,

Judge U. S. District Court, District of Alaska.

[Endorsed]: In the District Court of the United States for the District of Alaska, Division No. One, at Ketchikan. United States, Plaintiff and Defendant in Error, vs. Dan Lott, Defendant and Plaintiff in Error. Writ of Error. Filed Oct. 16, 1912. E. W. Pettit, Clerk. By ———, Deputy. [32]

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*In U. S. District Court in and for the District of  
Alaska, Division No. One, at Ketchikan.*

No. —.

THE UNITED STATES OF AMERICA,  
Plaintiff,

vs.

DAN LOTT,  
Defendant.

**Citation.**

The President of the United States to the United States of America, and to JOHN RUSTGARD, U. S. Attorney for the District of Alaska, Division No. One, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, Cal., thirty days from and after the day this citation bears date, pursuant to a writ of error filed in the clerk's office of the U. S. District Court in and for the District of Alaska, Division No. One, at the town of Ketchikan, Alaska, wherein Dan Lott, defendant, is plaintiff in error, and you, the United States of America, are defendant in error, to show cause, if any there be, why the judgment rendered

against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

WITNESS the Honorable THOMAS R. LYONS, Judge of the U. S. District Court in and for the District of Alaska, Division No. One, this 16th day of October, A. D. 1912.

THOMAS R. LYONS,  
Judge of U. S. District Court in and for the District  
of Alaska, Division No. One.

Service of the within and foregoing citation is hereby [34] admitted this 16th day of October, A. D. 1912.

JOHN RUSTGARD,  
U. S. District Attorney for the 1st Division of the  
District of Alaska.

[Endorsed]: No. ——. In the District Court of the United States for the District of Alaska, Division No. One, at Ketchikan. United States, Plaintiff, vs. Dan Lott, Defendant. Citation. Filed Oct. 16, 1912. E. W. Pettit, Clerk. By ———, Deputy. [35]

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*In the District Court for the Territory of Alaska,  
Division Number One, at Ketchikan.*

No. 264—K. B.

UNITED STATES,

Plaintiff and Defendant in Error;

vs.

DAN LOTT,

Defendant and Plaintiff in Error.

**Certificate [of Clerk U. S. District Court to Record,  
etc.].**

I, E. W. Pettit, Clerk of the District Court for the Territory of Alaska, Division Number One, do hereby certify that the foregoing and hereto attached thirty-six pages of typewritten matter, numbered from one to thirty-six, both inclusive, constitutes a full, true and correct copy, and the whole thereof, prepared in accordance with the praecipe of the defendant and plaintiff in error, on file in my office and made a part hereof, in cause No. 264-K. B., of the above-entitled court, wherein United States is plaintiff and defendant in error and Dan Lott is defendant and plaintiff in error. I do further certify that the said record is by virtue of the Writ of Error and Citation issued in this cause, and the return thereof in accordance therewith.

I do further certify that this transcript was prepared by me in my office, and that the costs of preparation, examination and certificate, amounting to Twelve and 35/100 (\$12.35) Dollars, has been paid me by Kazis Krauczunas, attorney for Dan Lott, defendant and plaintiff in error.

In witness whereof, I have hereunto set my hand and affixed the seal of the above-entitled court this 26th day of October, 1912.

[Seal]

E. W. PETTIT,  
Clerk of the District Court, for the Territory of  
Alaska, Division No. One.

[Endorsed]: No. 2201. United States Circuit Court of Appeals for the Ninth Circuit. Dan Lott, Plaintiff in Error, vs. United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Territory of Alaska, Division No. 1.

Received November 6, 1912.

F. D. MONCKTON,  
Clerk.

Filed November 15, 1912.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Meredith Sawyer,  
Deputy Clerk.



IN THE  
**United States**  
**Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

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DAN LOTT,                      *Plaintiff in Error,*

*vs.*

UNITED STATES OF AMERICA,  
                                    *Defendant in Error.*

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No. 2201.

**Brief of Plaintiff in Error**

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KAZIS KRAUCZUNAS,  
Attorney for Plaintiff in Error.

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**In the**  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

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DAN LOTT,            *Plaintiff in Error,*

*vs.*

UNITED STATES OF AMERICA,  
                                 *Defendant in Error.*

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No. 2201.

**Brief of Plaintiff in Error**

**STATEMENT OF THE CASE.**

Writ of Error to the United States District Court for the District of Alaska, Division No. 1, upon a Judgment of Conviction and Sentence, upon Affidavit and Complaint, charging that defendant, Dan Lott, an Indian, *incited another to commit a crime—to-wit the crime of furnishing liquor to an Indian,* under Sec. 142 of the Alaska Criminal Code.

The Complaint was originally made and filed in the Commissioner's Court, at Ketchikan, Alaska, where the defendant was found guilty, and by sen-

tence of the Commissioner fined \$50.00 and costs; subsequently, upon an appeal from the Commissioner's Court, the matter was brought on, *de novo*, in the District Court, where defendant was again found guilty, and this time fined \$75.00 without costs.

A demurrer was interposed to the Complaint on the ground that the facts set forth in the Complaint did not constitute a crime under the laws applicable to the Territory of Alaska, which was overruled.

A motion to set aside the verdict, for a new trial and in arrest of judgment, was made in the District Court, after the verdict, which motion was overruled.

On May 17th, 1912, a Petition for Writ of Error was duly filed, and an Order was signed by the Judge of the District Court allowing a Writ of Error; and on the same day an Appeal Bond was duly approved and filed; also on the same day the Assignment of Errors was duly filed; and on October 16th, 1912, a Writ of Error was duly allowed, issued and filed, and a Citation with admission of service, was duly issued and filed.

## ASSIGNMENTS OF ERROR.

There are but two Assignments of Error, and they go to assigning error upon the overruling of defendant's demurrer, on the ground that the facts stated in the Complaint did not constitute a crime:

### ASSIGNMENT No. 1.

That Sec. 218, Alaska Criminal Code, Part I, does not create common law crimes; that the common law of England does not apply to Alaska in so far as to create common law crimes not expressly designated by law.

### ASSIGNMENT No. 2.

That solicitation by an Indian to purchase intoxicating liquor does not constitute a crime under Sec. 142 of the Alaska Criminal Code, nor under any law.

## BRIEF OF THE ARGUMENT.

### I.

SOLICITING ANOTHER TO COMMIT A CRIME, NOT  
OFFENCE UNDER SEC. 142.

The conviction was had under Sec. 142 of the Alaska Criminal Code, PROHIBITING THE  
SALE OF LIQUOR TO INDIANS.

*The complaint does not charge the commission of that crime; but that defendant incited another to commit that crime.*

Dan Lott is an Indian, and the Complaint charges that he *solicited the liquor for himself.*

A demurrer was duly interposed on the ground that the facts stated in the Complaint did not constitute a crime under the laws applicable to the Territory of Alaska.

This Writ brings up for review the sole question, *Is soliciting, by an Indian, of the sale to him, of liquor, a crime under the provisions of Sec. 142 of the Alaska Criminal Code as amended in 1909?*

At the outset, this must seem to this Honorable Court an innovation,—a novel and unique construction upon Sec. 142; yet, that is the claim by the Government; and the consequent judgment of conviction and sentence, upon that theory, has compelled the bringing of this Writ of Error.

As the Complaint is manifestly founded upon Sec. 142, it becomes essential to have it before us, in order to test the question sought to be reviewed.

Sec. 142 of the Alaska Criminal Code as amended in 1909 reads as follows:



“That if any person shall, without the authority of the United States, or some authorized officer thereof, sell, barter, or give to any Indian or half-breed who lives and associates with Indians, any spirituous, malt, or vinous liquor or intoxicating extracts, such person shall be fined not less than one hundred nor more than five hundred dollars or be imprisoned in the penitentiary for a term not to exceed two years.”

Clearly, a Complaint, or Conviction, under the wording of this section must be predicated upon the actual commission of the offense of SELLING LIQUOR TO AN INDIAN; but that is not what the Complaint charges, however; the offence charged, in the Complaint, is, SOLICITING AND INCITING ANOTHER TO COMMIT the offence prohibited by Sec. 142. *Yet*, that is not all; the Complaint accuses the defendant (below) of having *solicited another to sell HIM (the defendant) liquor*. There is no charge in the Complaint, that the defendant was soliciting the purchase of liquor in order to peddle or sell it to other Indians; but the flat charge is that he *solicited and incited the complaining witness to sell him some whiskey*; it stops there; it does not charge that he *succeeded* in procuring the whiskey; in other words, the offence of *selling liquor to an Indian* was only SOLICITED AND INCITED; he is not charged with having *procured* the whiskey.

It must at once be plain and clear to this Honorable Court that the *plaintiff in error is not charged, in the Complaint, with the crime set forth in Sec. 142; but with the offence of SOLICITING AND INCITING ANOTHER to commit that crime; but it should be noted, however, that he solicited the purchase for himself; in other words, the liquor was for himself, the defendant (below); the Complaint charges that the solicitation was*

“to sell, barter and give spirituous liquor, to-wit: *whiskey, to the said Dan Lott, the said Dan Lott being then and there an Indian.* \* \* \*”

• There is no charge in the Complaint, nor from any interpretation of the wording thereof, that the liquor which the plaintiff in error solicited was intended to be sold by him to other Indians; in other words, he is not charged with being a so-called *booze-peddler*. We must simply take the plain intent and meaning of the Complaint, which is, that he **SOLICITED THE COMPLAINING WITNESS TO SELL HIM SOME WHISKEY.** It is this last act of defendant's which must be contemplated by the provisions of Sec. 142, and held to be a crime; *if not, then the conviction cannot stand.*

Let us suppose that the plaintiff in error had been *successful in procuring the liquor from the*

complaining witness, Ford,—the crime defined in Sec. 142 would then have been fully committed. What crime? Certainly, the crime of *selling liquor to* (plaintiff in error) *an Indian*. But who, then, would have committed the crime? Certainly not the Indian,—he would not be guilty of any crime contemplated by Sec. 142 in RECEIVING or BUYING the liquor;—the crime would then have been committed *by no other than the complaining witness, Ford*.

It is respectfully submitted that the act of *buying* liquor by an Indian is not what is aimed at by Sec. 142; the act prohibited by Sec. 142 is the act of *selling it*. The decision must depend upon the answer to the question, *Is the buyer of intoxicating liquor* (who is in the class to whom the sale of liquor is prohibited) *equally guilty with the seller?*

The general weight of authority is strongly in the *negative*. Particularly should this be so in the present case, *as the defendant is within the class of persons* to whom the sale of liquor is prohibited. The plaintiff in error is, in the Complaint, designated as an Indian; Sec. 142 prohibits the sale of liquor to Indians. Now, the Complaint charges that the Indian solicited the purchase of liquor. The sale was not consummated. Just where did the Indian com-

mit an offence under Sec. 142? *He did not sell it, and he did not buy it.* It must be too clear for argument that the plaintiff in error is not charged in the Complaint with the offence mentioned in Sec. 142.

## II.

### SEC. 218 DOES NOT CREATE COMMON LAW CRIMES AGAINST UNITED STATES.

It will be claimed by the Government that Sec. 218 of the Alaska Criminal Code, by which the common law of England is adopted in Alaska, CREATES the crime charged in the Complaint, and that plaintiff in error, under that section, is guilty of the offence charged.

Sec. 218 of the Alaska Criminal Code reads as follows:

“(Common law of England adopted.) The common law of England as adopted and understood in the United States shall be in force in said district except as modified by this Act. (30 Stat. L. 1285.)”

Sec. 218 DOES NOT CREATE COMMON LAW CRIMES of which the UNITED STATES could take cognizance; the only crimes of which the United States can take cognizance are those which are *specifically defined by Congress*. A common law offence cannot by any process of reasoning be made

an offence against the United States, unless Congress has by specific enactment declared the same an offence.

*United States vs. Eaton*, 144 U. S. 677.

*Peters vs. United States*, 94 Fed. Rep. p. 127.

*Wilkins vs. United States*, 96 Fed. Rep. p. 837.

In the case of *In Re: Greene*, 52 Fed. Rep. p. 104 at p. 111, it was said:

"In the consideration of this indictment it should be borne in mind that THERE ARE NO COMMON LAW OFFENCES AGAINST THE UNITED STATES; that the Federal Courts cannot resort to the common law as a source of criminal jurisdiction; and that Congress must define these crimes, fix their punishment, and confer the jurisdiction to try them."

*In Re: Greene*, 52 Fed. Rep. p. 104, at p. 111.

Assuming for the purpose of argument, however, that Sec. 218 creates common law crimes, *that* section cannot create a crime, *which was not a crime at common law*. THE COMMON LAW DID NOT DEAL WITH INDIANS, and the first legislation concerning Indians was enacted by Congress:

By Sec. 1955 Rev. Stat. (being the act of May 17th, 1884), the President was authorized to prohibit, restrict and regulate, the importation of fire-

arms, ammunition and distilled spirits in the Territory of Alaska.

By the act of May 17th, 1884, by Sec. 14, the importation, manufacture and sale of intoxicating liquors in the Territory of Alaska (with certain exceptions) was prohibited, and the President was required to make regulations to carry the same into effect.

By Sec. 142 of the act of March 3rd, 1909, the act of selling liquor or fire-arms to Indians was prohibited; and Sec. 1955 and certain parts of Sec. 14 were repealed.

The amendment of 1909 makes two changes in Sec. 142 of the act of 1899; first, it changes the character of the offence by making it a felony; second, it prohibits the sale of liquor to Indians who have not become citizens of the United States.

So that the amendment of 1909 makes it a felony for any person to sell liquor to an Indian who has not become a citizen of the United States.

Therefore it is respectfully submitted that Sec. 218 of the Alaska Criminal Code, does not create the crime specified in Sec. 142, which prohibits the sale of liquor to Indians. Consequently, it follows as a



matter of course, that the act of *soliciting and inciting* another to commit the crime prohibited by Sec. 142 is not a crime under Sec. 218.

### III.

#### SOLICITING ANOTHER TO COMMIT A CRIME "MALUM PROHIBITUM" NO OFFENCE.

Assuming that plaintiff in error had actually succeeded in procuring the liquor,—that is, that had he been successful in soliciting and inciting the full commission of the crime under Sec. 142,—would he then be *particeps criminis*?

The weight of authority is *against the proposition*, although he knows that the circumstances will render the sale of the liquor an offence.

The Government will claim that solicitation of another to commit a crime should be punished; and that the solicitation by an Indian, of a white man, to commit the crime of furnishing liquor to the Indian, should be punished,—because the act prohibited by Sec. 142 is a felony. This proposition would be sound if all felonies were *mala in se*; but manifestly this is not the case. The act of selling liquor to an Indian is in itself lawful, at most it is indifferent; it is only made an offence by Sec. 142,

and Sec. 142 makes the commission of the offence therein prohibited a felony. So this is one case where a felony is not *malum in se*.

THE SOLICITATION OF ANOTHER TO COMMIT A CRIME DOES NOT DEPEND UPON A MERE TECHNICAL DEFINITION OF A FELONY; the TRUE TEST is whether the crime, to commit which another has been solicited, is within the classes designated *mala in se* or *mala prohibita*. SOLICITING another to commit a crime which is *malum prohibitum*, SHOULD NOT BE PUNISHED; the act of inciting another to commit the crime of selling liquor to an Indian in violation of Sec. 142 is *malum prohibitum*, and is, therefore, not a crime under the leading cases.

In the Massachusetts case of *Com. vs. Willard*, 22 Pick. 476, which seems to be a leading case on the subject, the distinction was made that in cases where the offence was of those designated *mala prohibita* THE BUYER WAS NOT GUILTY OF ANY OFFENCE; but in cases where the offence was of those designated *mala in se* the buyer was guilty of the offence of aiding and abetting in the commission of the offence under the statute. *Mr. Chief Justice Shaw*, speaking for the Court in that case, used the following language:

“We know of no case where an act which, previously to the statute, was lawful or indifferent, is prohibited under a small, specific penalty, and while the soliciting or inducing another to do an act by which he may incur the penalty, is held to be itself punishable. Such a case perhaps may arise, under peculiar circumstances, in which the principle of the law, which in itself is a highly salutary one, will apply; *but the Courts are all of opinion that it does not apply to the case of one who, by purchasing spirituous liquor of an unlicensed person, does, as far as that act extends, induce that other to sell in violation of the statute.*”

In the case just quoted from, it was laid down that THE PRIME CONSIDERATION in determining whether a person is guilty of an offence, in soliciting another to commit a crime,—must be the determination of the question, WHETHER THE CRIME ITSELF IS OF A HIGH AND AGGRAVATED CHARACTER. Quoting further from the opinion by *Mr. Chief Justice Shaw*—

“It is difficult to draw any precise line of distinction between the cases in which the law holds it a misdemeanor to counsel, entice or induce another to commit a crime, and where it does not. In general, it has been considered as applying to cases of felony, though it has been held that it does not depend upon a mere legal and technical distinction between felony and misdemeanor. *One consideration, however, is manifest in all the cases, and that is that the offence proposed to be committed, by the counsel, advice or enticement of another, is of a high and aggravated character, tending to breaches of the peace or other great disorder and violence, being*

what are usually considered 'MALA IN SE,' or criminal in themselves, in contra-distinction to 'MALA PROHIBITA,' or acts otherwise indifferent then, as they are restrained by positive law." (Id.)

In the case of *State vs. Cullins*, 24 L. R. A. 212 (Kan.), the *Willard case* is approved and quoted from; and makes the same holding. In the *Cullins case* the Court also made the distinction which was made in the *Willard case*; that where the offence is *malum prohibitum* the person who solicits the commission of the offence is not guilty with the principal; but where the offence is *malum in se* the person soliciting the offence is equally guilty with the person who actually commits the crime. In that case the Court said:

"Notwithstanding the amendment to the constitution prohibiting the sale and manufacture of intoxicating liquors, *the offence of selling intoxicating liquors* in violation of the constitution and the statute, *is an offence mala prohibita* and is not of the class which are considered *mala in se*."

*State vs. Cullins*, 24 L. R. A., p. 212, at p. 214; see Note.

"*The purchaser of liquor* which is sold in violation of law, although he knows the sale to be illegal, *cannot be held guilty of any offence, on the ground of his soliciting* or tempting the seller to violate the law, or on the ground of his having aided and abetted the crime to the mere extent of buying the liquor."

23 *Cyc.* p. 210 (h) ; and cases there cited.

#### IV.

##### “ATTEMPT” NO CRIME UNDER SEC. 142.

In the case of the *United States vs. Stephens* (*Circuit Court, D. Oregon*), 12 Fed. Rep. p. 52, the defendant was accused of the crime of introducing spirituous liquors into the District of Alaska contrary to law; and by the second count of the information, of the crime of *attempting* to so introduce such liquors into said District. The defendant demurred to the information on the ground that the facts stated in the information did not constitute a crime.

The information was brought under Sec. 1 of the Alaska Act of June 27th, 1868 (Sec. 1954, Rev. Stat.), as amended by the general Appropriation Act of March 3rd, 1873, which provides among other things, that “if any person shall introduce or attempt to introduce any spirituous liquors or wine into the Indian Country” (with certain exceptions), he “shall forfeit and pay a sum not exceeding \$300.00.”

It will be noticed from the quoted excerpt of this section, that an *attempt* to commit the offence

prohibited by this act is also made a crime. Congress undoubtedly recognized the necessity for including an *attempt* under this section, as an attempt to commit that crime is specifically included in the act defining the crime.

“It is doubtless if any attempt to commit an offence of this character is indictable at common law, and this is probably the reason why it was made so specifically by the act defining the crime.”

*United States vs. Stephens*, 12 Fed. Rep. 52.

Yet under this section, which by its terms includes an *attempt*, it was held in that case that—

“an offer to purchase whiskey with the intent to ship it to Alaska, is in any view of the matter, a mere act of preparation, of which the law takes no cognizance.” (Id.)

The decision goes a little further and holds that even the purchase of liquor, with intent to take it into Alaska, or to give it to a minor, does not constitute an *attempt* under the section above quoted.

“A purchase of spirituous liquor at San Francisco or Portland either in person or by written order or application, with intent to commit a crime with the same,—as to dispose of it at retail without a license, or to a minor, or to introduce it into Alaska,—is merely a preparatory act indifferent in its character, of which the law \* \* \* cannot take cognizance.” (Id.)



See also

*Westheimer vs. Weisman*, 57 Pac. (Kan.) 969.

*Anderson vs. South Chicago Brewing Company*, 50 N. E. (Ill.) 655.

## V.

### PURPOSE OF SEC. 142 IS TO PROTECT THE INDIAN.

There is still another reason why SOLICITATION OF THE PURCHASE, by an Indian, of intoxicating liquor, in violation of Sec. 142, should not be held an offence under Sec. 218.

The very evident intent of Congress in enacting the provisions of Sec. 142, and similar enactments, was to *protect* the Indian. The Alaska Indian, was, by the treaty with Russia, guaranteed the same rights and privileges as the Indian of the United States. This was expressly held in the case of *Nagle vs. United States*, 191 Fed. Rep. 141, wherein Judge Wolverton, speaking for the Court in that case said:

“There can be no doubt that this stipulation relates to the Indian tribes of Alaska, and manifestly the treaty was designed to insure them like treatment, under the laws and regulations of Congress, as should be accorded Indian tribes in the United States.”

So that *to punish an Indian for soliciting* the sale of liquor to him, *would*, under the plain meaning and intent of the *Noble case*, be a violation of the *treaty* of the United States with Russia, by which the United States assumed the *guardianship* over the Alaska Indian.

The proposition of punishing an Indian for an attempt to procure liquor is wholly unsound, and out of harmony with the reasons which impelled Congress by specific legislation, to make it an offence, for any person to furnish liquor to an Indian.

The legislation by Congress was made in the spirit of acknowledgement that the United States assumed *responsibility and guardianship* over the Indian, and so enacted legislation, under which persons, who furnished the Indian with liquor, could be punished. It surely was not the intent of Congress to punish the Indian for *asking* for liquor; in fact, the legislation was for the purpose of *protecting* the Indian from the white man—and so—to punish any person who supplied him with what Congress intended he should not have. It is not maintained that an Indian selling liquor to another Indian would not be amenable to punishment under the provisions of Sec. 142; but it is claimed that it was not the intent of Congress to punish an Indian

under Sec. 142 for *asking* for liquor or for *soliciting* and *inciting* another to furnish it to him; but on the contrary, that it was the intent of Congress in enacting Sec. 142, *to place the responsibility upon the person who furnished him with liquor*, in violation of law, and to provide a penalty for such violation.

## VI.

INDIAN IS WARD OF GOVERNMENT, AND AS SUCH HE  
SHOULD BE TREATED.

The Government holds that the Indian should be punished for asking for liquor, *in order to protect the white man* from committing the crime prohibited by Sec. 142.

This theory is absolutely ill-founded, and is inconsistent with the evident intent of Congress in enacting Sec. 142 punishing *other persons* for furnishing liquor to the Indian. If it was the intention of Congress to punish the Indian for *soliciting* that which that section forbids *other persons* to furnish him, Congress would have so provided by special enactment.

The Indian is the *ward* of the Government and as such he should be treated. THE CRIME CONSISTS IN SELLING HIM LIQUOR; *not in his soliciting its purchase*. Does the law punish minors,

to whom the sale of liquor is prohibited, for *receiving* it, or for *asking* for it? Does a parent punish the child for *asking* for what it is forbidden to have?

From a reading of Sec. 142 and the reasons which prompted Congress to enact that section, it must be clear that the legislation prohibiting the sale of liquor to Indians was made *against the white man*, and for the *benefit of the Indian*. If the conviction in this case is upheld, the effect thereof will be that the Indian for whose benefit the law was made would be punished; and THE WHITE MAN, AGAINST WHOM THE LAW WAS MADE, WOULD GO FREE.

## VII.

IF BUYER WERE TO BE HELD GUILTY WITH PURCHASER, SEC. 142 OF THE ALASKA CRIMINAL CODE WOULD BECOME NUGATORY.

If the buyer, to whom the sale of intoxicating liquor is prohibited, could be held equally guilty with the purchaser, the effect thereof would be to render Sec. 142 of the Alaska Criminal Code absolutely nugatory; as *prosecutions* under that act, as well as similar acts, are most always *sustained* against the seller, *by the testimony of the buyer*; and in a prosecution against the seller, AN INDIAN

WHO HAD PURCHASED LIQUOR COULD HOLD HIMSELF EXEMPT FROM TESTIFYING CONCERNING THE SALE, ON THE GROUND THAT SUCH TESTIMONY MIGHT INCRIMINATE HIM. The result of which would be that no conviction could be obtained against white men, *booze peddlers*, in the Indian country, nor in Alaska, as the *Indian-buyer*, in each case, could be instructed to claim exemption from testifying as a witness against the seller.

THIS WOULD RENDER SEC. 142 OF THE ALASKA CRIMINAL CODE ABSOLUTELY USELESS, *and the sale of liquor to Indians in Alaska, as well as in the Indian territory, could be conducted with dire results to the Government, and with great profit to such class of persons as would follow this occupation, with the assurance of absolute immunity from prosecution under Sec. 142.*

“If this Court should determine that, in prosecutions against parties for the unlawful sale of intoxicating liquors, the purchaser is equally guilty with the seller, *the statute would be much more difficult of enforcement.* Most of the convictions, in prosecutions of this kind, are sustained by the testimony of purchasers; and, *if purchasers and sellers are equally guilty, prosecutions will be less successful than heretofore.* \* \* \*”

*State vs. Cullins* (Kan.), 24 L. R. A., p. 212,  
at p. 214.

## SUMMARY OF POINTS.

The *points* upon which the argument herein is founded are given below, upon any one, or all of which, the conviction in this case should be reversed, and the fine ordered remitted.

### 1.

Inciting and soliciting the PURCHASE of liquor is not a crime under Sec. 142 of the Alaska Criminal Code.

### 2.

Soliciting a *sale* might be an offence under Sec. 142; BUT SOLICITING A "PURCHASE" could not by any elastic reasoning be brought within the crime defined in Sec. 142.

### 3.

The BUYER—to whom the sale of liquor is prohibited—is *not guilty* of a crime in BUYING the liquor.

### 4.

If the BUYER is equally guilty with the *seller*, STILL HE IS NOT GUILTY OF A CRIME IN



## “ATTEMPTING” TO BUY THE LIQUOR.

### 5.

That if an INDIAN-PURCHASER is held equally guilty with the WHITE-MAN-SELLER, under Sec. 142, no convictions could be had against the *white-man-seller* for violating the provisions of that section, BECAUSE THE INDIAN-PURCHASER COULD NOT BE COMPELLED TO TESTIFY AGAINST THE “SELLER,” ON THE GROUND THAT HIS TESTIMONY MIGHT INCRIMINATE HIM.

### 6.

A violation of Sec. 142 is a felony; a felony is a common law crime; by Sec. 218 of the Alaska Criminal Code, the common law is revived; BUT, SOLICITATION OF ANOTHER TO COMMIT A CRIME WHICH IS “MALUM PROHIBITUM” IS NOT A CRIME.

### 7.

Sec. 218 of the Alaska Criminal Code *does not* CREATE common law crimes; THERE ARE NO COMMON LAW CRIMES AGAINST THE UNITED STATES, EXCEPT THOSE WHICH HAVE BEEN SPECIFICALLY DEFINED BY ACT OF CONGRESS.

## 8.

If it is held that Sec. 218 of the Alaska Criminal Code CREATES common law crimes, STILL THE DISTINCTION MUST BE MADE BETWEEN SOLICITING A CRIME WHICH IS "MALUM IN SE" AND ONE WHICH IS "MALUM PROHIBITUM."

## 9.

Selling liquor to an Indian WAS NO CRIME AT COMMON LAW; therefore Sec. 218 of the Alaska Criminal Code could not make SOLICITING that offence a crime.

## 10.

Sec. 142 is designed to PROTECT the Indian; and is directed AGAINST the white man. In its practical application, its effect is to PROTECT the BUYER and to EXPOSE the SELLER.

## LASTLY.

Convictions under Sec. 142 will be impossible, if INDIAN-BUYERS or INDIANS SOLICITING THE PURCHASE of liquor can be held guilty of an offence under that section. AND THE EFFECT WILL BE THAT SEC. 142 WILL BECOME NUGATORY.

IN CONCLUSION, it desired to call the attention of this Honorable Court to the fact that the purpose of the Government in Alaska in attempting to obtain convictions of Indians who *ask for* liquor—or even—(to go a step further)—of those Indians who *solicit its purchase, by a bribe*—is not readily discernible; perhaps there is present in Alaska a condition of affairs that might make it necessary to punish the Indian for attempting to bribe white men into selling them liquor; or, it may be that in most cases the violation of Sec. 142 by white men is directly chargeable to the act of the Indian in offering a bribe to the white man;—but it is submitted, with respectful sincerity and force, that Acts of Congress which *create and define crimes, as clearly as Sec. 142 defines the crime therein set forth* MUST NOT, by an elastic process of reasoning, be drawn forward to meet and to embrace an act or practice—(that, it may be, has become offensive, or even dangerous, to the people of a certain place or locality)—in order to remedy that condition or to stop or punish that practice. If there is a condition present in Alaska which requires that Indians should be punished for offering bribes to white men to sell them liquor, it should be remedied by the recommendation of the necessary enactment by Congress.

Exhaustive effort has been made to find a similar case, but without success. It is thought to be entirely true to say that *this is the first time* that any such construction has ever been put upon Sec. 142 of the Alaska Criminal Code, as that put upon it by the Government in *securing the conviction* of the plaintiff in error in the District Court of Alaska.

*By reason of all of which* it is respectfully submitted that the act of SOLICITING another to commit the crime defined in Sec. 142 of the Alaska Criminal Code, IS NOT A CRIME UNDER THAT SECTION; NOR UNDER SEC. 218 OF THE ALASKA CRIMINAL CODE; NOR UNDER ANY LAW.

The demurrer interposed by the plaintiff in error *should have been sustained*, and in overruling the same, there was error, for which the judgment of conviction and sentence should in all things be set aside and reversed, and the fine remitted.

All of which is respectfully submitted.

KAZIS KRAUCZUNAS,  
Attorney for Plaintiff in Error.

WM. J. CLAASSEN,  
Of Counsel.

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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No. 2201.

DAN LOTT,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

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## BRIEF OF DEFENDANT IN ERROR

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### STATEMENT OF THE GOVERNMENT'S POSITION.

The plaintiff in error, Dan Lott, an Indian, was complained against in the Commissioner's Court for Ketchikan Precinct, District of Alaska, First Division, and charged with soliciting one C. Ford to commit the felony of furnishing liquor to an Indian, to-wit, Dan Lott himself.

The complaint is based upon the following propositions:

(1) That in enacting laws which are intended to be of local application in Alaska only, and not of federal or nation-wide application, Congress acts in the capacity of a local legislature—acts *qua* state legislature, and that in that capacity Congress has plenary powers, subject only to the general constitutional guaranties and limitations; and that acting in that capacity Congress enacted Section 218 of the Penal Code of Alaska which reads as follows:

“COMMON LAW OF ENGLAND ADOPTED. The common law of England as adopted and understood in the United States shall be in force in said District, except as modified by this Act.”

(2) That Dan Lott solicited the commission of a felony and said Section 218 makes it a misdemeanor to solicit the commission of a felony; the felony so solicited by Dan Lott to be committed being a violation of Section 142 of the Penal Code of Alaska as amended by the Act of February 6, 1909, ch. 80, 35 Stat. L. 601, 603, the said section as amended reading as follows, to-wit:

“Sec. 142. That if any person shall, without the authority of the United States, or some authorized officer thereof, sell, barter, or give to any Indian or half-breed who lives and associates with Indians, any spirituous, malt, or vinous liquor or intoxicating extracts, such person shall be fined not less than one hundred nor



more than five hundred dollars or be imprisoned in the penitentiary for a term not to exceed two years.

“That the term ‘Indian’ in this Act shall be construed to include the aboriginal races inhabiting Alaska when annexed to the United States, and their descendants of the whole or half blood, who have not become citizens of the United States.”

(3) That the fact that Dan Lott is an Indian does not exempt him from the operation of Section 218.

### ORDER OF THE ARGUMENT.

In sustaining these propositions and answering the objections to them made in the brief of the plaintiff in error, our argument will take the following order and form:

I. Congress, acting *qua* state legislature, had full power and authority to enact said Section 218, and the enactment thereof extended to Alaska “the common law of England as adopted and understood in the United States,” except as modified by the Penal Code.

II. Section 218 (A) effects more than an extension of the common law rules of interpretation and construction to Alaska, and (B) makes the common law of crimes, except as modified by the Code, applicable and in force in Alaska without the necessity of there being an express statutory designation or definition of such common law crimes: it does exactly

what it purports to do—extends the common law of crimes to Alaska, except as modified by the Code.

III. Such extension makes the solicitation by one person of the commission of a felony by another person a misdemeanor.

IV. Indians soliciting other persons to commit a felony are guilty of the misdemeanor of solicitation, for Indians are not exempted from the operation of Section 218 either (A) because they are Indians, or (B) because they are wards of the Government, or (C) because it would be impolitic to hold them subject to its operation, or (D) because there was no common law crime of furnishing liquor to Indians.

## ARGUMENT.

### I.

CONGRESS, ACTING *QUA* STATE LEGISLATURE, HAD FULL POWER AND AUTHORITY TO ENACT SAID SECTION 218, AND THE ENACTMENT THEREOF EXTENDED TO ALASKA “THE COMMON LAW OF ENGLAND AS ADOPTED AND UNDERSTOOD IN THE UNITED STATES,” EXCEPT AS MODIFIED BY THE PENAL CODE.

The brief of plaintiff in error declares, in effect, that Section 218 must be void, of no effect, and meaningless, because, to quote the language of that brief, “the only crimes of which the United States can take cognizance are those which are specifically defined by

Congress. A common law offence cannot by any process of reasoning be made an offence against the United States, unless Congress has by specific enactment declared the same an offence." (Brief of Plaintiff in Error, pp. 10-11.) The argument and the authorities cited therein are wholly beside the point.

While there are no common law offenses against the United States, *qua* national government, it does not follow that the Congress, in enacting laws, *qua* state legislature, for a Territory, may not make a general provision extending to such Territory "the common law of England as adopted and understood in the United States" (meaning, obviously, as adopted and understood in general by the several States of the United States). In legislating for a Territory as such (and not as an integral part of the federal whole), Congress acts as a state legislature acts when enacting laws for a State. This is a wholly different field of action from that which is embraced in ordinary federal legislation.

American Insurance Co. v. Canter, 1 Pet. 511, 546.

National Bank v. County of Yankton, 101 U. S. 129.

Binns v. United States, 194 U. S. 486.

Gibbons v. District of Columbia, 116 U. S. 404.

Mattingly v. District of Columbia, 97 U. S. 687.

In re Dana, 68 Fed. Rep. 886, 899.

Allen v. Myers, 1 Alaska 114, 118.

In the leading case of American Insurance Co. v. Canter, *supra*, Chief Justice Marshall said (p. 546) :

“Although admiralty jurisdiction can be exercised in the States, in those courts only which are established in pursuance of the third article of the constitution; the same limitation does not extend to the territories. *In legislating for them, congress exercises the combined powers of the general, and of a state government.*” (All italics in this brief are ours.)

In *National Bank v. County of Yankton*, *supra*, Mr. Chief Justice Waite said, speaking for the Court (pp. 132-133):

“It is certainly now too late to doubt the power of Congress to govern the Territories. . . . Congress may legislate for them *as a State does for its municipal organizations.* . . . In other words, it has full and complete legislative authority over the people of the Territories and all the departments of the Territorial governments. It may do for the Territories *what the people, under the Constitution of the United States may do for the States.*”

In *Binns v. United States*, *supra*, the Court said (p. 491):

“It [Congress] may legislate directly in respect to the local affairs of a Territory or transfer the power of such legislation to a legislature elected by the citizens of the Territory. It has provided in the District of Columbia for a board of three commissioners, who are the controlling officers of the District. It may entrust to them

a large volume of legislative power, or it may by direct legislation create the whole body of statutory law applicable thereto. For Alaska, Congress has established a government of a different form. It has provided no legislative body but only executive and judicial officers. It has enacted a penal and civil code."

The Supreme Court, in deciding *Gibbons v. District of Columbia*, *supra*, said in reference to *Loughborough v. Blake*, 5 Wheat. 317:

"The point there decided was that an act of Congress, laying a direct tax throughout the United States in proportion to the census directed to be taken by the Constitution, might comprehend the District of Columbia; and the power of Congress, *legislating as a local legislature for the District*, to levy taxes for District purposes only, *in like manner as the legislature of a State* may tax the people of a State for State purposes, was expressly admitted, and has never since been doubted. 5 Wheat. 318; *Welch v. Cook*, 97 U. S. 541; *Mattingly v. District of Columbia*, 97 U. S. 687. In the exercise of this power, Congress, *like any State legislature* unrestricted by constitutional provisions, may at its discretion wholly exempt certain classes of property from taxation, or may tax them at a lower rate than other property."

In *Mattingly v. District of Columbia* it was said by the Court (p. 690):

“Congress may legislate within the District [of Columbia], respecting the people and property therein, *as may the legislature of any State* over any of its subordinate municipalities.”

As was said by the Court In re Dana, *supra*, (p. 899) :

“In administering the local law of the District of Columbia, the national government there acts *as the State governments act* within their several limits in administering the ordinary rights of person and property. That is an exceptional and a wholly different field of action from what is embraced in ordinary federal legislation.”

Congress, not only in all national matters, but also in all local and municipal matters relating to a Territory, has plenary powers, within constitutional limitations.

Shively v. Bowlby, 152 U. S. 1, 48.

Binns v. United States, 194 U. S. 486, 491.

Mormon Church v. United States, 136 U. S. 1, 42.

McAllister v. United States, 141 U. S. 174, 184, 188, 190.

Endelman v. United States, 86 Fed. Rep. 456, 459.

In Shively v. Bowlby, *supra*, the Court said (p. 48) :

“By the Constitution, as is now well settled, the United States, having rightfully acquired the Territories, and being the only government



which can impose laws upon them, have the entire dominion and sovereignty, national and municipal, Federal and State, over all the Territories, so long as they remain in a Territorial condition."

In *Binns v. United States*, *supra*, the Supreme Court, speaking by Mr. Justice Brewer, said (p. 491) :

"It must be remembered that Congress, in the government of the Territories as well as of the District of Columbia, has plenary power, save as controlled by the provisions of the Constitution . . . ."

Speaking by Mr. Justice Bradley, the Supreme Court said in *Mormon Church v. United States*, *supra* (p. 42) :

"The power of Congress over the Territories of the United States is general and plenary, arising from and incidental to the right to acquire the Territory itself, and from the power given by the Constitution to make all needful rules and regulations respecting the Territory or other property belonging to the United States. It would be absurd to hold that the United States has power to acquire Territory, and no power to govern it when acquired."

From these authorities it follows that Congress, in enacting the Code for Alaska, was perfectly competent to extend the common law of crimes to Alaska. And acting *qua* State legislature it has done so by

Section 218, if it be possible so to extend the common law by a provision of a general nature; and that it is possible there can be no question. Otherwise, it would be necessary to enact the common law by specific statute—with the result that the law would then be statutory, not common law. That an extension to a Territory of the common law can be made by a general provision has been held repeatedly.

8 Cyc. 386 (C.) and cases cited in Note 22.

In re Burkell, 2 Alaska 108, 119.

Valentine v. Roberts, 1 Alaska 536.

Browning v. Browning, 9 Pac. (N. M.) 677, 684.

And see as recognizing the extension of the common law by such general enactment

Luhrs v. Hancock, 181 U. S. 567.

Cyc., *supra*, reads:

“As a general rule by express adoption, the common law is the rule of decision in the courts of the Territories of the United States, except in so far as it is inapplicable or inconsistent with acts of Congress or of the territorial legislature.”

The District Court of Alaska expressly held, in deciding In re Burkell, *supra*, that Section 218 extended the common law of crimes to Alaska.

In Browing v. Browning, 9 Pac. 677 (N. M.), in discussing the effect of an enactment by the territorial legislature reading “in all courts of this Territory, the common law, as recognized in the United States of America, shall be the rule of practice and

decision," the Court, adverting to the meaning of the term "common law" as used in that enactment, said (p. 684) :

"In those states and territories which were not of the original colonies, and which have not in terms adopted any English statutes, but have adopted the common law, the unwritten or common law of England, and the acts of parliament of a general nature, not local to Great Britain, which had been passed and were in force at the date of the war of the Revolution, and not in conflict with the constitution or laws of the United States, nor of the State or Territory, and which were suitable to the wants and condition of the people, are the common law of such States and Territories.

"This Territory belongs to the last class. It was not a part of the original colonies, but was acquired in 1848. The legislature has not in terms adopted any British statutes, nor has it undertaken to define what is embraced in the words 'common law' used in Section 1823, *supra*. We are therefore of opinion that the legislature intended, by the language used in that section, 'to adopt the common law, or *lex non scripta*, and such British statutes of a general nature, not local to that kingdom, nor in conflict with the constitution or laws of the United States, nor of this Territory, which are applicable to our condition and circumstances, and which were in

force at the time of our separation from the mother country.”

And the Court accordingly held that by the enactment of the above quoted general provision extending the common law, the statute of limitations (21 Jac. I) was extended to and became operative in the Territory of New Mexico.

## II.

### SECTION 218 EXTENDS THE COMMON LAW OF CRIMES—IT DOES NOT (A) MERELY SUPPLY A RULE OF INTERPRETATION OR CONSTRUCTION, OR (B) STAND IN NEED OF SUPPLEMENTATION BY EXPRESS DESIGNATION OR DEFINITION OF COMMON LAW CRIMES.

From the foregoing considerations it is apparent that Congress had the power to extend to Alaska the common law of crimes, and Section 218 purports to effect such extension, except as modified by the Code. Two objections have been made to such an interpretation: (A) that Section 218 merely extends the common law rules of interpretation and construction; (B) “that Sec. 218, Alaska Criminal Code, Part I, does not create common law crimes; that the common law of England does not apply to Alaska in so far as to create common law crimes not expressly designated by law.” (First Assignment of Error, p. 5 of Brief of Plaintiff in Error.)

(A) In the argument on the demurrer in this case the counsel for defendant stated that Section

218 merely extends the common law as an aid in construing the statutory law. There are traces of the same idea in the brief of plaintiff in error. In ruling on the demurrer Judge Lyons made the following statement with reference to this argument:

“The defendant contends that Section 218 merely extends the common law to Alaska as an aid in construing the statutory law; that the only purpose of Section 218 is to extend the common law rule of interpretation to the District of Alaska.

“If the defendant’s contention be tenable it would seem that Section 218 is superfluous, for in the construction of statutory law or in the ascertainment of the meaning of any of the terms employed the Court would look to the common law as the same has been construed by the courts without the common law actually being extended by specific legislation. The rules of interpretation which would be followed by the Court in any event would be the rules adopted and adhered to by the English and the American courts. The original growth and meaning of the law and its terms must be ascertained where any doubt exists, by considering the original history and growth of the provisions of the statute as well as the language used by the legislature. In order, therefore, to give full force and effect to Section 218 it must be construed to extend the common law of England as adopted and understood in the United States, except where the

same is modified by statutory enactment, to the District of Alaska." (The whole opinion of the lower court in overruling the demurrer is given herein: see Appendix A.)

We think this disposes of the first objection.

(B) The meaning of the first assignment of error is obscured by the word "create." Laws never create crimes but only declare that certain acts are crimes; the persons who commit the forbidden acts create the crimes. The word "create" must therefore be here used in some other sense. Putting the only reasonable construction we can think of on the first assignment it is understood to mean that unless an act is made criminal by some section of the Code expressly declaring such act to be criminal, Section 218 does not make it so. That is, to use the language of the assignment of error, an act which was a crime at the common law is not a crime in Alaska unless "expressly designated by law" to be a crime. Which is but another way of saying that Section 218 is without any effect whatsoever. For "expressly designated" must mean defined and declared to be a crime, and then the act so declared to be a crime would be such without the aid of Section 218. In other words this process of reasoning is but a method of declaring that Congress did not mean anything at all by Section 218, notwithstanding it is a sweeping general provision appended to the end of the Title defining crimes and at the end of the chapter in that Title which embodies general provisions respecting crimes in Alaska. Such a construction is manifestly absurd,



and absurd constructions are to be avoided if possible. Moreover such a construction violates the canon that all parts of a statute shall be given meaning and effect and made to stand together, if possible.

The authorities cited in the brief of plaintiff in error to the effect that there are no common law crimes against the United States as a national government, state that in order to constitute an act which was criminal at common law, a crime against the federal government, it must be "expressly designated," defined, and the punishment prescribed; otherwise the federal courts cannot entertain jurisdiction or take cognizance of it. But those authorities are totally beside the point; as we have demonstrated they have no application whatsoever to a statute enacted by Congress, acting in the capacity of a local legislature for a Territory, by which the common law is extended to that Territory.

The foregoing considerations, we submit, dispose of the first assignment of error.

### III.

THE EXTENSION BY SECTION 218 OF THE  
COMMON LAW OF CRIMES MAKES THE  
SOLICITATION BY ONE PERSON OF  
THE COMMISSION OF A FELONY BY AN-  
OTHER PERSON A MISDEMEANOR.

The common law rule appears clearly from the authorities to be that he who solicits another to commit

*either a felony or a misdemeanor* is guilty of the misdemeanor of solicitation.

1 Bishop's New Cr. L., §768.

1 McClain's Cr. L., §220.

Rex v. Vaughn, 4 Burr. 2494.

Rex v. Plympton, 2 Lord Raym. 1377.

Rex v. Higgins, 2 East 5.

State v. Keyes, 8 Vt. 57, 30 Am. Dec. 450.

United States v. Lyles, 4 Cranch C. C. 469, Fed.  
Cas. No. 15,646.

Com. v. Harrington, 3 Pick. 26.

Walsh v. People, 65 Ill. 58, 16 Am. Rep. 569.

Bishop says (1 New Cr. Law, §768):

“ . . . to render a solicitation indictable, it is in general, as in other attempts, *immaterial whether the thing proposed is technically a felony or a misdemeanor* . . . .”

And again the same author says (1 New Cr. L., §768 c. 2):

“The adjudged law, from early times down to the present day, makes mere solicitation, in the circumstances explained in the foregoing sections, an indictable attempt. And a sufficient form of the averment is settled to be that, at a time and place mentioned, the defendant ‘falsely, wickedly, and unlawfully did solicit and incite’ a person named to commit the substantive crime, without any further specification of overt acts. The adequacy of this form of the allegation stands unquestioned and unquestionable in the

authorities, ancient and modern; and, beyond cavil or possible overthrow, it proves that solicitation is an adequate attempt; *and that the doctrine is general, not limited to special offenses.*”

McClain says (1 Cr. Law, §220) :

“The form of intent which perhaps involves the least degree of criminality is that of a solicitation of another to do an act which, if done, would constitute a *crime*, and such a solicitation is generally held to be punishable as a misdemeanor, although the offense solicited is never committed.”

Grose, J., in *Rex v. Higgins*, said :

“All these cases prove that inciting another to commit a misdemeanor is itself a misdemeanor; *a fortiori*, therefore, it must be such to incite another to commit felony.”

There was no statute against the offense charged against Harrington in the case of *Com. v. Harrington*, 3 Pick. 26, namely, renting his house to a woman known to him to be a prostitute. The Court said that the question was whether it was indictable at common law, and concluded that defendant could be convicted

“because he let the house for that purpose; it being at common law a misdemeanor to incite, aid or encourage one to commit *a misdemeanor*.”

Speaking through Judge Redfield the Court said in the case of *State v. Keyes*, 8 Vt. 57, 30 Am. Dec. 450:

“And we feel no hesitation in saying, that . . . soliciting another to commit *an offense* should . . . be held indictable, as misdemeanors at common law.”

In *Walsh v. People*, 65 Ill. 58, 16 Am. Rep. 569, the Court said:

“ . . . we are of opinion that it is a misdemeanor to propose to receive a bribe. It must be regarded as an inciting to offer one, and a solicitation to commit an offense. This, at common law, is a misdemeanor. Inciting another to the commission of an *indictable offense*, though without success, is a misdemeanor.”

But it is not necessary for the defendant in error to establish that one who solicits another to commit a *misdemeanor* is guilty of a crime. The plaintiff in error was charged with soliciting the commission of a felony, and conceding that some of the courts have wavered concerning the criminality of soliciting the commission of a misdemeanor, there is no division among them as to the criminality of soliciting the commission of a felony: they are unanimous in holding that at common law he who incites another to do a felonious act is guilty of a misdemeanor. This is the view which Judge Lyons supported in his opinion given in ruling on the demurrer in this case, which opinion is given in full in Appendix A herein, and the following authorities are to the effect that soliciting the commission of a felony is a misdemeanor:

1 Hawkins P. C. 55.

- 1 Russ. on Cr. 49.
- 3 Chitty's Cr. Law 994
- 1 Bishop's New Cr. L. §768.
- 1 McClain's Cr. L. §220.
- Rex v. Higgins, 2 East 5 (Larceny).
- Rex v. Plympton, 2 Lord Raym. 1377 (Bribery)  
(10 Geo. II).
- Rex v. Vaughn, 4 Burr. 2494 (Bribery) (1769).
- Rex v. Philipps, 6 East. 464.
- Rex v. Johnson, 2 Show. 1 (30 Chas. II).
- Walsh v. People, 65 Ill. 58, 16 Am. Rep. 569  
(Bribery).
- State v. Keyes, 8 Vt. 57, 30 Am. Dec. 450 (Ob-  
structing justice).
- State v. Bowers, 35 S. C. 262, 15 L. R. A. 199  
(Arson).
- Com. v. Randolph, 146 Pa. St. 83, 23 Atl. 388, 28  
Am. St. Rep. 782 (Murder).
- Stabler v. Com., 95 Pa. St. 318, 40 Am. Rep. 653  
(Murder).
- State v. Avery, 7 Conn. 266, 18 Am. Dec. 105  
(Adultery).
- Com. v. Flagg, 135 Mass. 545 (Arson).
- State v. Sales, 2 Nev. 268 (Embracery).
- People v. Bush, 4 Hill (N. Y.) 134 (Arson).
- State v. Holding, 1 McCord L. 31 (Obstructing  
justice).
- State v. Davis, Tapp. (Ohio 1817) 171.
- Pennsylvania v. McGill, Addison 21 (1792).
- State v. Sullivan (Mo.), 84 S. W. 105 (Bribery).
- People v. Hammond (Mich.), 93 N. W. 1084  
(Bribery).

In *Rex v. Higgins*, A solicited B (a servant of C) to steal goods from C. B did not do so. A was held guilty of the misdemeanor of soliciting the commission of a felony. Lord Kenyon said:

“But it is agreed that a mere intent to commit evil is not indictable without an act done; but is there not an act done when it is charged that the defendant solicited another to commit a felony? The solicitation is an act . . . .”

Le Blanc, J., in the same case, said:

“It is contended that the offense charged in the second count, of which the defendant has been convicted, is no misdemeanor, because it amounts only to a care, wish, or desire of the mind to do an illegal act. If that were so, I agree that it would not be indictable. But this is a charge of an act done, namely, an actual solicitation of a servant to rob his master, and not merely a wish or desire that he should do so. A solicitation or inciting of another, by whatever means it is attempted, is an act done, and that such an act done with a criminal intent is punishable by indictment has been clearly established by the several cases referred to.”

And Grose, J., in the same case, said:

“But further, an attempt to commit even a misdemeanor has been shown in many cases to be itself a misdemeanor. Then, if so, it would be extraordinary indeed if an attempt to incite to a felony were not also a misdemeanor. If a rob-



bery were actually committed, the inciter would be a felon. The incitement, however, is the offense, though differing in its consequences, according as the offense solicited (if it be felony) is committed or not. The guilt of an accessory before is in many cases as great as that of the principal; sometimes indeed it is even deserving of greater punishment. For the principal is often put upon committing the offense by the accessory before, and is instructed by him how to perpetrate it . . . .”

“It is also objected, that some act should be laid to have been done in pursuance of the incitement; but I do not remember any case where such an averment has been holden to be necessary; nor can it be deemed so, if, as I conceive, the gist of the offense is the incitement: and indeed if the incitement were to commit felony, and the fact were committed, the inciter would himself be a felon.”

Lawrence, J., said:

“All such acts or attempts as tend to the prejudice of the community, are indictable. Then the question is whether an attempt to incite another to steal is not prejudicial to the community, of which there can be no doubt.”

In *Rex v. Plympton* the facts were that in a certain town corporation twelve burgesses and twelve assistant burgesses were to elect one of their number as mayor. A and B were two of the twenty-four

burgesses and assistants. A promised B 500 pounds sterling if he would vote for C for mayor, and A was found guilty of the misdemeanor of solicitation.

In *Rex v. Vaughn* the facts were as follows: The Duke of Grafton was the First Lord of the Treasury and Privy Councillor. A desired to obtain for the lives of his three sons the position of Clerk of the Court of Jamaica. To accomplish this he sought the aid of B, who had influence with the Duke, and induced B to promise the Duke 5000 pounds sterling if the said position were given to A for said three lives. A was held guilty of the crime of solicitation.

In *Rex v. Johnson* the defendant Johnson was an attorney and in the trial of a civil action he became convinced that a certain deed introduced in evidence by the adversary was a forged instrument; acting in good faith he offered to a man who, he supposed, could establish the fact that the instrument was a forgery, the sum of 350 pounds sterling for proof that it was a forgery; Johnson was convicted of the crime of soliciting with money the giving of evidence. Shortly afterwards he died from the suffering which the disgrace brought upon him, and many years afterwards the deed was actually established by judicial inquiry to be a forgery.

A general provision of the statutes of Nevada extended the common law of crimes to Nevada, the same as Section 218 extends it to Alaska. And in *State v. Sales*, 2 Nev. 268, the Court said (p. 271):

“Under this view of the law, if the defendant solicited the attorney to employ money to corruptly influence the jury, he is indictable for inciting or soliciting another to commit the crime of embracery.”

Smith v. Com., 54 Pa. St. 209, was a case of solicitation to adultery and it was held that such solicitation was not a crime, but it was admitted that where the offense solicited to be committed is a felony, the solicitation is a crime. And in a later case in the same court, Com. v. Randolph, 146 Pa. St. 83, 28 Am. St. Rep. 782, it is said:

“Smith v. Commonwealth, 54 Pa. St. 209, 93 Am. Dec. 686, decided that solicitation to commit fornication and adultery is not indictable. But fornication and adultery are mere misdemeanors of our law, whereas murder is a capital felony.”

And in the Randolph case it was held that solicitation to commit a felony is a crime.

In People v. Hammond, 93 N. W. (Mich.) 1084, 1085, the Court says:

“It is strenuously contended that the indictment charges no offense known to the laws of this state. It is conceded by the learned counsel for the state that there is no statute defining the offense set out in the indictment, but it is contended that the case falls within the statute (Comp. Laws, §11,795) providing for the punishment of offenses indictable at the common

law. In other words, it is claimed that the indictment sets out an offense at the common law. Respondent's counsel assert that solicitation to commit a crime is not indictable when there is interposed between a solicitation on the one hand and the proposed illegal act on the other the resisting will of another person, which other person refuses assent and co-operation; citing, among other cases, *McDade v. People*, 29 Mich. 50, and *Smith v. Commonwealth*, 54 Pa. St. 209, 93 Am. Dec. 686. It may be accurate to say that what is treated in the law as an attempt to commit a crime is not complete where there is interposed between the solicitor and the consummation of the completed offense the resisting will of the one whom the solicitor seeks to employ as the active agent. But to say that a solicitation may not amount to an offense under these circumstances is to deny that a solicitation to commit a felony is punishable at the common law as a substantive and completed offense. Can this be properly asserted?"

What is said in *State v. Sullivan*, 84 S. W. 105, 108, is distinctly applicable to the case at bar:

" . . . while there is no statute on the subject, yet to solicit a bribe is a misdemeanor under the common law in force in this state. While it was a felony at common law to bribe a judicial officer, it does not appear clear whether it was a felony or a misdemeanor to bribe other offi-

cers. The distinction becomes important from the fact that it is not altogether certain that soliciting one to commit a misdemeanor is a common-law offense. The books leave such question in a state of uncertainty. It has been said that to bribe a legislative officer is only a misdemeanor at common law, and that to solicit the commission of a misdemeanor is not an offense; that soliciting the bribe in this case was merely soliciting the commission of a misdemeanor, and was therefore not a common-law offense. While, as we have just said, doubt has been cast on the question, yet we believe that it was a common-law offense to incite or solicit another to commit a misdemeanor. . . . Text-writers have laid down the law that to solicit the commission of an offense was indictable, without noticing any distinction whether the offense solicited was a felony or misdemeanor. Bishop on Crim. Law, *supra*; Wharton on Crim. Law, *supra*; 1 Russell on Crim. Law, 193, 194. These writers look only to the character of the offense in its evil tendency, and not to its technical designation."

And again the Court says, in the same case (p. 109):

"But if we should be mistaken in the view that to solicit one to commit a misdemeanor is itself a misdemeanor at common law, it would not affect this case. For it is certain that to solicit the commission of an offense which is a felony

is a misdemeanor at common law. It can make no difference whether the offense which is solicited is made a felony by act of parliament or by the common law. It is only necessary that it be a felony, no matter how made so. In those jurisdictions where it prevails, the common law is a standing declaration that whoever solicits the commission of a felony is guilty of a misdemeanor. It is not a declaration that whoever solicits the commission of an offense which is a felony at any given time shall be guilty of a misdemeanor, but it is a declaration that whoever solicits the commission of an act which is a felony at the time solicited is guilty of a misdemeanor. In this state the statute makes it a felony to bribe a legislative officer. If the defendant solicited that he be bribed, he solicited the commission of a felony, and he therefore committed a common-law misdemeanor."

Thus it is clear that the solicitation to commit a *statutory* felony is a common law misdemeanor.

State v. Sullivan, 84 S. W. (Mo.) 105, 109.

People v. Hammond, 93 N. W. (Mich.) 1084, 1085.

These cases dispose of the contention that because furnishing liquor to Indians was not a crime at common law therefore the solicitation of the crime of furnishing liquor to Indians cannot be a crime. The learned editor who wrote the note on solicitation to



crime in 25 L. R. A. 434, said of the rule contended for by plaintiff in error that it

“does not allow for the growth of the common law which is certainly a thing of growth. In fact, indictments for solicitation to crime are of comparatively modern origin, and in some cases have not been used until quite recently.”

Though we conceive it is not so much that the common law “grows” as that it is applicable to new subject matters and situations as the progress of time and society bring about new conditions.

Again, to the argument that furnishing liquor to Indians was not a crime at common law and therefore solicitation to furnish liquor to Indians cannot be a crime, it can be answered that the same argument, if valid, would prevent the application to railroads of the common law rules relating to common carriers, because there were no railroads in the old common law days. Instances might be multiplied indefinitely. Solicitation to crime was a crime at common law. The old rule is applicable to new circumstances whenever they arise. Therein, as has been said so frequently, lies the chief virtue of the common law. Solicitation to crime being at the common law a crime, it matters not that the crime solicited to be committed is defined by the last penal statute placed on the statute book—even if the ink is not yet dry—a solicitation to commit a breach of that statute is the common law offense of solicitation. It is but new wine in old bottles—a new subject matter

falling within an old rule. As was said in *State v. Sullivan*, *supra*:

“ . . . whoever solicits the commission of an act which is a felony at the time solicited is guilty of a misdemeanor.”

Solicitation to commit an indictable offense, though without success, is a misdemeanor.

*State v. Bowers* (S. C.), 15 L. R. A. 199.

*People v. Hammond* (Mich.), 93 N. W. 1084.

*Walsh v. People*, 65 Ill. 58, 16 Am. Rep. 569, 571.

*Com. v. Randolph*, 146 Pa. St. 83, 28 Am. St. Rep. 782.

*Com. v. Flagg*, 135 Mass. 545.

In *Sulston v. Norton*, 3 Burr. 1235, decided in 1761, Lord Mansfield said of a case where a bribe had been offered and accepted but the promise not carried out:

“And I wonder how it could ever be a doubt: For the offense was completely committed by the corrupter; whether the other party shall afterwards perform his promise or break it.”

The failure of the animate agent whom the defendant attempted to employ, to commit the solicited crime does not excuse the defendant—he is nevertheless guilty of the crime of solicitation. As was said by the Court in *State v. Bowers* (p. 201):

“There can be no doubt that a person may commit a felony either by his own hand or by

the hand of another, prompted or encouraged by him; and, if he undertakes to commit a felony by his own hand, and his purpose is frustrated by the failure of the inanimate agencies which he employs to serve his felonious purpose, he would unquestionably be guilty of an attempt to commit a felony. Upon the same principle, if, instead of undertaking with his own hand to effect his felonious purpose, he undertakes to employ the agency of another, furnishing him with the means requisite to effect his purpose, and offering him an inducement to do so, the fact that such agent fails him will not relieve him from responsibility for that which he not only intended to have done, but which he took the necessary steps to accomplish. If the failure of the inanimate agency to effect the purpose which he desired and intended to accomplish will not relieve him from responsibility for the felonious act which he attempted to perpetrate by the use of such agency, we do not see why the failure of his animate agent to carry out the purpose which he desired him to effect, and furnished him with the means of effecting, should relieve him from like responsibility."

And in *Walsh v. People*, *supra*, it is said:

"Inciting another to the commission of an indictable offense, *though without success*, is a misdemeanor."

In the head note in *Com. v. Flagg*, 135 Mass. 545, it is said:

“It is an indictable offense at common law for one to counsel and solicit another to commit a felony, although the solicitation is of no effect, and the crime counseled is not in fact committed.”

Mr. Irving Browne says in his note to *Stabler v. Com.*, 40 Am. Rep. 653, 657:

“As we said at the outset, the true doctrine probably is, that any *direct mere solicitation to commit a specific criminal offense* against a particular individual, or the community, *although not consummated*, is indictable as a solicitation, but not as an attempt.”

The brief of plaintiff in error has attempted to draw a distinction between the law of solicitation as it applies to soliciting an unlawful sale of liquor and as it applies to soliciting the commission of other crimes. It is claimed that though soliciting the commission of other crimes is criminal, yet soliciting a felonious sale of liquor is no crime at all. Two cases are chiefly relied on to buttress this position.

The case which is principally relied upon by the plaintiff in error as supporting his contention that the case at bar does not present an instance of criminal solicitation is *Commonwealth v. Willard*, 22 Pickering 474, in which the Court held that solicitation by A of B (who had no license to sell liquor), to sell liquor to A was not a crime. In Massachusetts selling liquor without a license was a misdemeanor, not a felony. In Alaska furnishing liquor

to Indians is a felony. And the case against Willard is rather an authority for the position taken by the Government in this case than otherwise. The Court stated :

“It is difficult to draw any precise line of distinction between the cases in which the law holds it a misdemeanor to counsel, entice, or induce another to commit a crime, and where it does not. *In general, it has been considered as applying to cases of felony*, though it has been held that it does not depend upon the mere legal and technical distinction between felony and misdemeanor. One consideration, however, is manifest in all the cases, and that is, that the offense proposed to be committed, by the counsel, advice or enticement of another is of a high and aggravated character, *tending to breaches of the peace or other great disorder or violence*, being what are usually considered *mala in se* or criminal in themselves, in contradistinction to *mala prohibita*, or acts otherwise indifferent than as they are restrained by positive law . . . .”

The furnishing of liquor to Indians not only tends to breaches of the peace and disorder and violence but in most cases actually brings about such breaches and disorders; the whole experience of the white people with the Indians, both in Alaska and throughout continental United States, has been that the use of liquor by Indians is highly injurious not only to themselves but to the white people among whom they live and with whom they associate; in other words,

that the furnishing of liquor to Indians is an evil in itself.

The Court further says in the Willard case:

“We know of no case, where an act which, *previously to the statute, was lawful or indifferent*, is prohibited under a small specific penalty, and where the soliciting or inducing another to do the act, by which he may incur the penalty, is held to be itself punishable.”

The furnishing of liquor to Indians has never, in all of the experience of the white people with the aborigines of America, been indifferent in its results. It is common knowledge that it has universally been most calamitous in its consequences. And it has never, since the United States acquired Alaska, indeed, never since 1824, been lawful to furnish the Indians there with liquor; of this we shall speak more at length hereafter.

Hence, on the true view of the facts, it is immaterial whether the criterion by which the solicitation is determined to be criminal or non-criminal be (a) that the solicited offense is a felony or (b) that it is a *malum in se*; for in either view of the matter the solicitation in this case was a crime. But the Court, in the Willard case, has admitted that the authorities hold that soliciting the commission of a felony is a crime. Of the law of solicitation the Court says:

“*In general, it has been considered as applying to cases of felony.*”

The Supreme Judicial Court of Massachusetts has



at no time adopted or followed the rule which plaintiff in error claims to extract from the Willard case — has never held that soliciting the commission of crime is criminal only when the crime solicited to be committed is *malum in se*. Indeed in *Com. v. Harrington*, 3 Pick. 26, a case decided before the Willard case, that court held explicitly that the defendant Harrington was guilty, though the crime which he solicited and incited *was only a misdemeanor*, the Court saying,

“it being at common law a misdemeanor to incite, aid, or encourage one to commit a misdemeanor.”

Shaw, C. J., in *Com. v. Willard* approved of the decision in *Com. v. Harrington*, and said :

“The keeping of such a disorderly house has long been considered a high and aggravated offense, criminal in itself, tending to general disorder, breaches of the public peace, and of common nuisance to the community.”

As we have already seen, in *Com. v. Flagg*, 135 Mass. 545, Norton, C. J., said (the case was decided in 1883) :

“It is an indictable offense at common law for one to counsel and solicit another to commit a *felony* or other aggravated offense, although the solicitation is of no effect, and the crime counselled is not in fact committed.”

And, continuing, the Court said :

“The first and second counts of the indictment in the case at bar allege with sufficient certainty that the defendant solicited one Thomas Stafford to burn the barn of one Ellen H. Clark and set out an offense at common law.”

Thus the highest court of Massachusetts has consistently recognized and enforced the rule for which we contend, namely, that he who solicits the commission of a felony is guilty of a misdemeanor.

The other case relied on by plaintiff in error is *State v. Cullins* (Kans.), 24 L. R. A. 212. That case holds that the purchaser of liquor from one not authorized to sell it is not guilty of aiding and abetting in the unlawful sale. In the first sentence of the opinion the Court thus stated the legal proposition involved in the case:

“The question in this case is whether the purchaser of liquor which is sold in violation of law is guilty of *unlawfully selling the same*; that is, whether, by purchasing, he counsels, *aids, or abets* in the unlawful sale, and may be convicted in the same manner *as if he were the principal*.”

And the Court answered the question in the negative. There was no question of solicitation in the case and could not be without express statute because *there is no common law of crimes in Kansas*. The Supreme Court of Kansas said in *State v. Bowles*, 79 Pac. 726, 731:

“There are no common-law offenses in this State, and there can be no convictions in this

State except for such crimes as are defined by statute.”

Hence the Cullins case is in no respect whatever an authority against the position of the defendant in error in the present case.

#### IV.

INDIANS ARE NOT EXEMPTED FROM THE OPERATION OF SECTION 218 EITHER (A) BECAUSE THEY ARE INDIANS, OR (B) BECAUSE THEY ARE WARDS OF THE GOVERNMENT, OR (C) BECAUSE IT WOULD BE IMPOLITIC TO HOLD THEM SUBJECT TO ITS OPERATION, OR (D) BECAUSE THERE WAS NO COMMON LAW CRIME OF FURNISHING LIQUOR TO INDIANS.

The argument against holding an Indian responsible for soliciting another person to commit a felony has assumed various forms: (A) that the Indian cannot be punished for a violation of law because he is an Indian; (B) that he ought not to be punished for such violation because he is a ward of the government and should be indulged and pampered and exempted from the operation of penal statutes, and (C) that he ought not to be punished because to punish him for soliciting another person to give him liquor would be impolitic since so doing would make it impossible to convict those who furnish the liquor to him; (D) that the law of solicitation does not cover a solicitation to furnish liquor to an Indian

because there was no common law crime of furnishing liquor to Indians.

We have answered this last objection, and in the course of our examination of the legal status of Indians in Alaska we will answer the others.

### A.

INDIANS IN ALASKA ARE PUNISHABLE  
UNDER THE SAME LAWS, BY THE SAME  
PROCEDURE, AND IN THE SAME  
COURTS, AS ALL OTHER INHABITANTS  
OF THAT TERRITORY.

The Indians of Alaska have not at any time been considered as having a title to the land of the Territory in such a sense as to make Alaska "Indian country" within the meaning of Section 1 of the Indian Intercourse Act of June 30, 1834, 4 Stat. L. 729, as that section is explained by the Supreme Court of the United States in the case of *Bates v. Clark*, 95 U. S. 204, 208, or within the amplification of that explanation by the same court in the case of *Ex parte Crow Dog*, 109 U. S. 556, 561.

The first section of the act of 1834 is as follows:

"Be it enacted, that all that part of the United States west of the Mississippi, and not within the States of Missouri and Louisiana, or the Territory of Arkansas, and also that part of the United States east of the Mississippi River, and not within any State[,] to which the Indian title has not been extinguished, for the purposes

of this act, be taken and deemed Indian country.”

The Supreme Court said in the case of *Bates v. Clark*, *supra* (pp. 208-209) :

“The simple criterion is that as to all the lands thus described it was Indian country whenever the Indian title had not been extinguished, and it continued to be Indian country so long as the Indians had title to it, and no longer. As soon as they parted with the title, it ceased to be Indian country, without any further act of Congress, unless by the treaty by which the Indians parted with their title, or by some act of Congress, a different rule was made applicable to the case . . .

“It follows from this that all the country described by the act of 1834 as Indian country remains Indian country so long as the Indians retain their original title to the soil, and ceases to be Indian country whenever they lose that title, in the absence of any different provision by treaty or by act of Congress.”

And in *Ex parte Crow Dog* the Court said (p. 561) :

“In our opinion that definition now applies to all the country to which the Indian title has not been extinguished within the limits of the United States, even when not within a reservation expressly set apart for the exclusive occupancy of Indians, although much of it has been

acquired since the passage of the act of 1834, and notwithstanding the formal definition in that act has been dropped from the statutes, excluding, however, any territory embraced within the exterior geographical limits of a State, not excepted from its jurisdiction by treaty or by statute, at the time of its admission into the Union, but saving, even in respect to territory not thus excepted and actually in the exclusive occupancy of Indians, the authority of Congress over it, under the constitutional power to regulate commerce with the Indian tribes, and under any treaty made in pursuance of it."

Alaska is not Indian country within this definition because the treaty of cession from Russia clearly negatives the idea that the Indian tribes or nations had any right of possession or otherwise to the soil of Alaska. The rights of individual Indians to their possession of the land occupied by them was guaranteed by the treaty, but it is apparent that the *tribes* were deemed to have no such rights.

The treaty provides:

"His Majesty the Emperor of all the Russias agrees to cede to the United States, by this convention, immediately upon the exchange of the ratifications thereof, *all the territory and dominion* now possessed by his said Majesty on the continent of America and in the adjacent islands . . . ." Art. I.

"In the cession of territory and dominion



made by the preceding article are included the right of property in all public lots and squares, *vacant lands*, and all public buildings, fortifications, barracks, and other edifices which are not private individual property." Art. II.

"*The cession of territory and dominion herein made is hereby declared to be free and unincumbered by any reservations, privileges, franchises, grants, or possessions, by any associated companies, whether corporate or incorporate, Russian or any other, or by any parties, except merely private individual property holders; and the cession hereby made conveys all the rights, franchises, and privileges now belonging to Russia in the said territory or dominion, and appurtenances thereto.*" Art. VI.

Thus Russia guaranteed that neither the Indians nor any one else had any rights in the lands of the Territory except as "private individual property holders" and the United States took the Territory free from all rights of possession or occupancy by the Indians as nations or tribes and subject only to their rights or holdings as "private individual property holders." Therefore Alaska has never been a part of the "Indian country." As was said by Judge Deady in *Kie v. United States*, 27 Fed. Rep. 351, 354:

"At the date of this cession Russia owned this country as completely as it now does the opposite Asiatic shore; and the right of the inhabitants in and to the use of the soil was such, and only such, as it saw proper to acknowledge or concede

to them. The United States took the country on the same footing, agreeing to respect the private property of individuals, and to make such regulations concerning the uncivilized natives, including, of course, their occupation of the soil, as it might deem best."

Hence the provisions of Sections 2145 and 2146 of the Revised Statutes have never applied to the Indians in Alaska. Those sections are as follows:

"Sec. 2145. Except as to crimes the punishment of which is expressly provided for in this Title, the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

"Sec. 2146. The preceding section shall not be construed to extend to (crimes committed by one Indian against the person or property of another Indian, nor to) any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively."

If these sections applied to Alaska they would clearly, in many cases, give the tribal organizations, instead of the courts, jurisdiction of offenses committed by Indians.

But as Alaska is not a part of the Indian country

it has been expressly held that those sections of the Revised Statutes do not apply to the Indians of Alaska and that therefore Alaskan Indians are subject to the same penal laws, and are to be tried by the same courts and by the same procedure as white men or any other persons who are accused of crime.

United States v. Kie, Fed. Cas. No. 15,528a.

Kie v. United States, 27 Fed. Rep. 351.

In the Kie case, *supra*, the defendant, an Alaskan Indian living at Juneau, stabbed and killed his Indian wife because she had committed adultery. His counsel contended that Sections 2145 and 2146 of the Revised Statutes, quoted above, applied, that therefore the Indian tribe, not the court, had jurisdiction of the defendant and his crime. Both Judge McAllister in the trial court and Judge Deady in the appellate court held that, Alaska not being Indian country, those sections did not apply and that the District Court of Alaska had jurisdiction. Judge Deady said (27 Fed. Rep. 354) :

“Congress, by the passage of the Alaska act of 1884, has provided a government for the country without any reservation or qualification as to the persons or classes of inhabitants over and upon whom it shall have jurisdiction and authority.”

Indians are indicted and tried at every term of the District Court of Alaska, First Division. No question is ever raised about the legality of these prosecutions.

Alaska not being Indian country the statutes enacted at sundry times applying to the Indian country and the Indians therein, were deemed not to apply to Alaska and the Indians therein.

We have thus established that the general laws relating to the Indian country have no application in Alaska. But it is sometimes said that Alaska is to be considered Indian country for the purpose of excluding liquor from the hands of the natives there. It may be useful, in this connection, to ascertain the exact meaning of that statement by tracing the history of the Indian liquor law, as it applies to Alaska; and also to ascertain whether in any sense whatever the Indian is saved or excepted from responsibility for his acts violative of that law.

#### HISTORY OF ALASKA LIQUOR LAW.

The first "liquor law" in Alaska was that provided by the treaty with Russia dated April 17, 1824, and found in 8 Stat. L. 304. By the fourth article of that treaty it was agreed that for a period of ten years next ensuing the ships of both powers might trade with the natives of the northwest coast of America (both the Russian and United States coasts).

By the fifth article it was provided:

"All spirituous liquors, fire-arms, other arms, powder and munitions of war of every kind, are always excepted from this same commerce permitted by the preceding article, and the two powers engage, reciprocally, neither to sell, nor suf-

fer them to be sold to the natives by their respective citizens and subjects, nor by any person who may be under their authority. It is likewise stipulated that this restriction shall never afford a pretext, nor be advanced, in any case, to authorize either search or detention of the vessels, seizure of the merchandise, or, in fine, any measures of constraint whatever towards the merchants or the crews who may carry on this commerce; the high contracting powers reciprocally reserving to themselves to determine upon the penalties to be incurred, and to inflict the punishment in case of the contravention of this article, by their respective citizens or subjects."

To enforce the terms and spirit of this fifth article the Act of May 19, 1828, ch. 57, 4 Stat. L. 276, was passed, which provided:

"Be it enacted" etc. "That if anyone, being a citizen of the United States, or trading under their authority, shall, in contravention of the stipulations entered into by the United States with the Emperor of all the Russias, by the fifth article of the treaty, signed at St. Petersburg, on the seventeenth day of April, in the year of our Lord one thousand eight hundred and twenty-four, sell, or cause to be sold, to the natives of the country on the northwest coast of America, or any of the islands adjacent thereto, any spirituous liquors, fire-arms, or other arms, powder or munitions of war of any kind, the person so offending shall be fined in a sum not

less than fifty nor more than two hundred dollars, or imprisoned not less than thirty days, nor more than six months.”

Alaska was acquired by the United States in 1867. A general and somewhat loose statute applying to intercourse with Alaska was enacted on July 27, 1868 (ch. 273, 15 Stat. L. 241) which later became Sections 1954 and 1955, R. S., the material provisions of which are as follows:

“Sec. 1954. The laws of the United States relating to customs, commerce, and navigation are extended to and over all the main-land, islands, and waters of the territory ceded to the United States by the Emperor of Russia by treaty concluded at Washington on the thirtieth day of March, anno Domini eighteen hundred and sixty-seven, so far as the same may be applicable thereto.

“Sec. 1955. The President shall have power to restrict and regulate or to prohibit the importation and use of fire-arms, ammunition and distilled spirits into and within the Territory of Alaska,”—

the remainder of Section 1955 providing the penalty for a violation of any order or regulation the President might make in the premises.

It was held in *United States v. Seveloff*, 2 Sawy. 311, Fed. Cas. No. 16,256, that these provisions of the Act of July 27, 1868, did not extend the Indian Intercourse Act of 1834 to Alaska. In order that the



Indians of Alaska might be placed on the same footing as the Indians in the Indian country as regards the introduction of liquor, Congress by express enactment, Act of March 3, 1873, 17 Stat. L. 530, extended Sections 20 and 21 of the Intercourse Act of 1834 to Alaska. Those sections relate to the introduction of liquor into the Indian country, and became Sections 2139, 2140 and 2141 of the Revised Statutes.

Hence the only parts of the Indian Intercourse Law which have ever been operative in Alaska are Sections 20 and 21 thereof. It therefore is sometimes stated that as to the introduction of spirituous liquor into Alaska that Territory is "Indian country."

United States v. Seveloff, Fed. Cas. No. 16,252.

Water v. Campbell, Fed. Cas. No. 17,264.

In re Carr, Fed. Cas. No. 2,432.

United States v. Stevens, 12 Fed. Rep. 52.

14 Opinions Attorneys General 327.

But in no other respect is it so—and in this respect only by figure of speech, because, as we have seen, it does not answer the definition of Section 1 of the Act of 1834 or the explanation or amplification thereof by the Supreme Court of the United States. As Attorney General Devens said (16 Opinions Attorneys General 142):

"In the opinion of my predecessor, Attorney-General Williams, of November 13, 1873, in answer to the inquiry whether the Territory of Alaska was embraced within the term 'Indian country,' he holds that as to these provisions

Alaska is to be regarded as Indian country; but it will be observed that he limits his opinion to these two sections, and does not hold that in the general use of the term Alaska is to be treated as Indian country, and be subjected to all the laws which have been made in relation to such country . . .

“Alaska cannot be considered merely as an Indian country. It is inhabited to a limited extent by white persons, whose rights, property, and religion, which were guaranteed by the treaty between the United States and Russia, should be protected by the United States, and the whole Territory cannot be subjected to the rules applied to Indian country, unless, at least, Congress should expressly render it subject to them.”

Of course Congress could have enacted, after its acquisition of Alaska, that the Territory should be considered as Indian country and subject to all the provisions of the Indian Intercourse Act of 1834 and the amendments and supplements thereto. But Congress has seen fit not to do so; it has seen fit to extend only said Sections 20 and 21.

In *United States v. Seveloff*, *supra*, Judge Deady says:

“The district attorney maintained that Alaska is a part of the Indian country, because it is inhabited by Indians, and because the act defining the Indian country, and regulating trade and intercourse with the Indians, and all other

acts not locally inapplicable, were extended over the country *proprio vigore*, as soon as it was acquired from Russia."

And the court answered that argument by saying:

" 'The Indian country,' within the meaning of the statute, making it a crime to introduce spirituous liquors therein, is only that portion of the United States or its territories, which has been declared to be such by an act of Congress. Because a country is inhabited or owned in whole or in part by Indians, it is not therefore an Indian country, within the purview of the trade and intercourse acts."

In short Alaska never became Indian country by force of the definition thereof in the Intercourse Act of 1834, or by force of the interpretation of that definition by the Supreme Court, or by force of any act of Congress enacted for that purpose, except only that Sections 20 and 21 of the law of 1834 were extended to Alaska by the act of 1873.

Thus the law stood until the enactment of the statute of May 17, 1884, ch. 53, 23 Stat. L. 24, organizing the territorial government. This organic act provided, among other things (Sec. 14):

"That the provisions of chapter three, title twenty-three, of the Revised Statutes of the United States, relating to the unorganized Territory of Alaska, shall remain in full force, except as herein specially otherwise provided; and the importation, manufacture, and sale of in-

toxicating liquors in said district except for medicinal, mechanical and scientific purposes is hereby prohibited under the penalties which are provided in section nineteen hundred and fifty-five of the Revised Statutes for the wrongful importation of distilled spirits. And the President of the United States shall make such regulations as are necessary to carry out the provisions of this section."

Sections 1954 and 1955, above quoted, are the first two sections of said chapter three, title twenty-three, Rev. St. We need not refer further to Section 1954 since it has been held not to be *in pari materia* with the other sections mentioned.

United States v. Seveloff, Fed. Cas. No. 16,252.

The law of 1884, in absolutely prohibiting the importation, manufacture and sale of intoxicating liquors in Alaska, except for medicinal, etc., purposes, took from the President the power to exercise any discretion in the matter which the law of 1868 gave to him. Thus from 1873 till the adoption of the Penal Code in 1899, Sections 20 and 21 of the Indian Intercourse Act of 1834 and also the law of 1868 were in force in Alaska, modified after 1884 by the provision regarding introducing liquors for medicinal, etc., purposes.

On March 3, 1899, the Penal Code was enacted; Section 142 thereof was as follows:

"That if any person shall, without the authority of the United States, or some authorized

officer thereof, sell, barter, or give to any Indian or halfbreed who lives and associates with Indians any firearms or ammunition therefor whatever, or any spirituous, malt, or vinous liquor, such person, upon conviction thereof, shall be punished by imprisonment in the county jail not less than two months nor more than six months, or by fine not less than one nor more than five hundred dollars. That the term 'Indian' in this Act shall be so construed as to include the aboriginal races inhabiting Alaska when annexed to the United States, and their descendants of the whole or half blood. Section nineteen hundred and fifty-five of the Revised Statutes of the United States, and all that part of section fourteen of 'An Act providing a civil government for Alaska,' approved May seventeenth, eighteen hundred and eighty-four, after the word 'provided,' is hereby repealed."

This section of the Code has uniformly been considered and treated as superseding said Sections 2139, 2140 and 2141 (which are the old Sections 20 and 21 of the Indian Intercourse Act of 1834); it is so considered because, covering the same general subject-matter, it effects a repeal by implication. It expressly repeals Section 1955 (which is that part of the law of 1868 which empowered the President to restrict, regulate or to prohibit the importation and use of fire-arms, ammunition and distilled spirits into and within Alaska,—and which had already been repealed by implication by the Act of 1884).

Then by Act of February 6, 1909, Section 142 was amended by striking out the reference to fire-arms and ammunition, by making the furnishing of liquor to Indians a felony, instead of a misdemeanor, and by excepting Indians who have become citizens from the purview of the section.

Hence so far as the legal liability of an Indian who furnishes liquor to another Indian in Alaska is concerned, there has not at any time been one iota of difference between him and a white man who committed the same offense. Then why should there be any difference when, instead of furnishing another Indian with liquor, he solicits some other person to do so? Alaska has not at any time been Indian country in such a sense that an Indian offender was to be tried there by the Indian tribunals. The natives there have at all times been amenable for their crimes to the white man's courts exclusively. Such is the law and such has been the universal practice in Alaska.

“LIQUOR,” “FIRE-ARMS” AND “AMMUNITION” ARE  
ASSOCIATED WORDS.

We have seen that the treaty of 1824 with Russia prohibited the introduction into Alaska of “all spirituous liquors, fire-arms, other arms, powder, and munitions of war of every kind”; that the Act of 1828 passed to make the prohibition effectual used exactly the same language; that the Act of 1868 gave the President “power to restrict and regulate or to prohibit the use of fire-arms, ammunition and dis-



tilled spirits into and within the Territory of Alaska"; and that Section 142 of the Code as originally enacted in 1899 had the same general terms in it. It was not until 1909 that the reference to fire-arms and ammunition was omitted. Hence from 1824 to 1909 it had been the policy of Russia and the United States to keep the natives of Alaska from having fire-arms and munitions of war as well as from having liquor.

Was this provision regarding fire-arms and ammunition "for the protection of the Indian against the white man," to use the phrase of plaintiff in error's brief? Was Congress afraid that the white man would shoot the Indians? Or was it to keep the Indians from acquiring the means of killing one another and the white people? Clearly, it was the latter. If that be true then why should it be argued that the exclusion of distilled spirits is on a different footing? In the Statutes the three are associate terms—"fire-arms, ammunition and distilled spirits." It is reasonable to conclude that they were all linked to carry out the same general policy. It was a fact well learned by Congress and the country at large that not only are fire-arms and ammunition in the hands of Indians dangerous to the whites, but that whiskey and Indians are a combination still more dangerous to the whites with whom the Indians associate. The same policy, therefore, undoubtedly prompted the exclusion of distilled spirits as that which inspired the exclusion of fire-arms and ammunition—the policy of protecting, first, the whites against the In-

dians and, secondly, the Indians against their own worse nature—the policy of protecting the whole mixed society of whites and Indians.

## B.

### MEANING OF THE STATEMENT THAT INDIANS ARE WARDS OF THE GOVERNMENT — THE REAL POLICY OF THE GOVERNMENT STATED.

It has frequently been said that the Indians are wards of the government, and appropriately. But by that it was meant that the government should not take any unfair advantage of them, should faithfully perform its treaty and other understandings with them, should duly guard and protect them, and should in all things act in as conscientious a manner towards them as a guardian should toward his ward. It was not intended by that expression to declare that for their crimes Indians should receive no punishment; to say they are wards of the government is not to declare that Indians have *carte blanche* to commit any and all crimes, or any crime at all, with impunity. If they are in a state of pupilage, if we are responsible for their good behavior, one of the best ways to secure their welfare and virtue is to punish them for their crimes. And this has been the policy adopted by the government.

It may be useful in this connection to trace the liability of Indians to punishment for their crimes, with particular reference to their liability to such punishment for violations of the law against furnishing liquor to other Indians in the Indian country.

HISTORY OF FEDERAL INDIAN LIQUOR LAW—LIABILITY  
OF INDIANS THEREUNDER.

The Indian Intercourse Act of March 30, 1802, ch. 13, Sec. 21, 2 Stat. L. 139, was as follows:

“Sec. 21. And be it further enacted, That the President of the United States be authorized to take such measures from time to time, as to him may appear expedient to prevent or restrain the vending or distributing of spirituous liquors among all or any of the said Indian tribes, any thing herein contained to the contrary thereof notwithstanding.”

Then by Act of March 3, 1817, ch. 92, 3 Stat. L. 383, Congress clearly expressed the intention to subject Indians to punishment for any crime they might commit, and provided that unless treaties forbade or the crimes were against Indians (and, therefore, punishable by the Indian tribes themselves) the offender should be punished like other criminals. The act provided:

“Be it enacted” etc. “That if any *Indian*, or other person or persons, shall, within the United States, and within any town, district, or territory, belonging to any nation or nations, tribe or tribes, of Indians, commit any crime, offense, or misdemeanor, which, if committed in any place or district of country under the sole and exclusive jurisdiction of the United States, would, by the laws of the United States, be punished with death, or any other

punishment, every such offender, on being thereof convicted, shall suffer the like punishment as is provided by the laws of the United States for the like offenses, if committed within any place or district or country under the sole and exclusive jurisdiction of the United States.

“Sec. 2. And be it further enacted, That the superior court in each of the territorial districts, and the circuit court and other courts of the United States, of similar jurisdiction in criminal causes . . . shall have, and are hereby invested with, full power and authority to hear, try, and punish, all crimes, offenses, and misdemeanors, against this act; . . . Provided, That nothing in this act shall be so construed as to affect any treaty now in force between the United States and any Indian nation, or to extend to any offense committed by one Indian against another, within any Indian boundary.”

The act of July 9, 1832, ch. 174, 4 Stat. L. 564, makes no discrimination in favor of Indians who give liquor to other Indians. Section 4 reads as follows:

“And be it further enacted, That no ardent spirits shall be hereafter introduced, under any pretense, into the Indian country.”

The Act of June 30, 1834, ch. 161, 4 Stat. L. 729, covers Indian offenders as well as white offenders. It provides:

“Sec. 20. And be it further enacted, That if *any person* shall sell, exchange, or give, barter, or dispose of, any spirituous liquors or wine to an Indian (in the Indian country), such person shall forfeit and pay the sum of five hundred dollars; and if *any person* shall introduce, or attempt to introduce, any spirituous liquor or wine into the Indian country, except such supplies as shall be necessary for the officers of the United States and troops of the service, under the direction of the War Department, such person shall forfeit and pay a sum not exceeding three hundred dollars; and if any superintendent of Indian affairs, Indian agent, or sub-agent, or commanding officer of a military post, has reason to suspect, or is informed, that any white person *or Indian* is about to introduce, or has introduced, any spirituous liquor or wine into the Indian country, in violation of the provisions of this section, it shall be lawful for such superintendent, Indian agent, or sub-agent, or military officer, agreeably to such regulations as may be established by the President of the United States, to cause the boats, stores, packages, and places of deposit of such person to be searched, and if any spirituous liquor or wine is found, the goods, boats, packages, and peltries of such person shall be seized and delivered to the proper officer, and shall be proceeded against by libel in the proper court, and forfeited, one-half to the use of the informer, and the other

half to the use of the United States; and if such person is a trader, his license shall be revoked and his bond put in suit. And it shall moreover be lawful for any person, in the service of the United States, or for any Indian, to take and destroy any ardent spirits or wine found in the Indian country, excepting military supplies as mentioned in this section.”

The expression “any person” includes Indians.

United States v. Miller, 105 Fed. Rep. 944.

United States v. Shaw-Mux, 2 Sawy. 364, Fed. Cas. No. 16,268.

United States v. Tom, 1 Ore. 27.

The Act of March 3, 1847, ch. 66, 9 Stat. L. 203, amended section twenty of the Act of 1834 by making it a felony to furnish liquor to Indians in the Indian country or to introduce liquor into said country.

Hence throughout this legislation it is clear that Congress intended that Indians who furnished liquor to other Indians should be subject to punishment.

Such was the policy of the government until March 27, 1854, when Congress enacted (ch. 26, Sec. 3, 10 Stat. L. 270) that nothing contained in section twenty of the Act of 1834 “which provides for the punishment of offenses therein specified, shall be construed to extend to any Indian committing said offenses in the Indian country.” But in the revision and re-enactment of said section twenty of the law of 1834 in the Acts of 1862, 12 Stat. L. 339, and 1864, 13 Stat. L. 29, Indians were again made punishable for fur-



nishing liquor to other Indians. That status of the law continued to the adoption of the Revised Statutes in which the revisers inserted in Section 2139, the words "except an Indian, in the Indian country," thus again making dispensable the Indian dispenser of liquor to his fellow-Indian. But the words so inserted by the reviser apparently were not noticed by Congress at the time of the adoption of the Revised Statutes for by Act of February 27, 1877, ch. 69, 19 Stat. L. 244, the words "except an Indian, in the Indian country" were stricken from Section 2139 and ever since then the Indian, like the white man, has been punishable if he furnished liquor to Indians. Hence during all the time from 1802 to this day, except a total of about ten years, the Indian who furnished liquor to another Indian in the Indian country has been punishable for so doing. And he has repeatedly been held so to be punishable.

United States v. Miller, *supra*.

United States v. Shaw-Mux, *supra*.

United States v. Tom, *supra*.

### C.

## THE ARGUMENT FROM IMPOLICY AND INCONVENIENCE IS SPECIOUS AND PROVES TOO MUCH.

In probably fifty per cent of the cases of furnishing liquor to Indians the seller makes the first advances, and holding Indians liable for soliciting infractions of the law against furnishing them with liquor would not affect such cases at all. But very,

very often, as is well known to all Alaskans, the Indian openly solicits a non-Indian to furnish him liquor. Sometimes the request is refused. Should not that Indian be punished for solicitation? In many cases the request is granted, but usually—indeed, in a large majority of the cases—the man himself who grants the request is drunk at the time. The Indian, with the cunning and shrewdness characteristic of the race, sees that the white man is maudlin drunk and takes advantage of the opportunity to persuade the latter to procure him liquor. Should not such an Indian be punished? Should all the punishment fall on the white man and should the Indian be wholly exempted from punishment for soliciting the commission of the crime? Should the white man be branded as a felon and punished by imprisonment in the penitentiary for a term of two years, and the Indian escape entirely the comparatively light punishment for the misdemeanor of soliciting?

The argument of impolicy derived from the inconvenience that may attend obtaining convictions against those who furnish liquor to Indians, is specious. It is argued that if the Indian who solicits and incites should be liable to conviction it will be impossible to convict the white man who furnishes him with liquor because the Indian can claim exemption from testifying, as to testify would criminate himself. Now in the first place, no prosecutor ever thinks of trying to convict on the testimony of the Indian alone who obtained the liquor, unless there

were several Indians in the party. In the second place, the same argument would apply in multitudes of other cases in which, nevertheless, criminal liability exists; for example, when a bribe is given by one and received by another the testimony of either against the other may be used, but this fact does not furnish a valid argument why either the one or the other should be legally punishable; so in cases of conspiracy, and many other offenses—in fact in all cases where two or more persons are engaged in the commission of crime, either as principals or accessories.

### RECAPITULATION.

We submit, therefore, that the following propositions are incontrovertible:

(1) At the common law it was a misdemeanor to incite and solicit the commission of any felony.

(2) It made no difference whether the crime solicited to be committed was a felony at the common law or by statute.

(3) Section 218 of the Penal Code of Alaska extends to Alaska the common law of crimes as that common law is adopted and understood in the United States, except so far as the Penal Code itself has prescribed the law of crimes.

(4) The common law, as adopted and understood in the United States, makes it a misdemeanor to solicit the commission of any felony,—either a common law or a statutory felony.

(5) The Penal Code of Alaska has made no other or different provision on the subject of solicitation to commit crime.

(6) Section 218 of the Penal Code of Alaska therefore makes it a misdemeanor to solicit a person in Alaska to furnish to any Indian there any intoxicating liquor.

(7) Alaska is not Indian country except for the purpose of preventing trafficking there in liquor with the Indians, and Indians in Alaska are uniformly responsible to the courts for all crimes committed by them exactly the same as are white people.

(8) Even in the Indian country of continental United States the Indians have uniformly, except for a period of about ten years, been held liable to the courts for furnishing liquor to other Indians and for introducing or attempting to introduce it into the Indian country. And at all times Indians soliciting the commission of crime in the Indian country were liable to the courts therefor in every jurisdiction to which the common law extended; for such solicitation is not a crime against another Indian but is a crime against the public.

(9) The treaty of 1824 with Russia and all subsequent legislation proves that the prohibition of all liquor trafficking with Indians in Alaska was made fully as much to protect the white man as to protect the Indian—indeed, the coupling of the terms “spirited liquor,” “fire-arms,” and “ammunition,” clearly indicates that the prohibition was pri-

marily for the benefit of the white man and only secondarily for the benefit of the Indian.

(10) Neither policy nor charity requires or permits that the Indian be exempted from liability to the courts for the crime of soliciting the commission of the felony of furnishing liquor to an Indian.

(11) Finally, when Dan Lott solicited Ford to furnish intoxicating liquor to him, Lott, he was guilty of the misdemeanor of soliciting the commission of a felony.

Respectfully submitted,

ROY V. NYE,  
Assistant United States Attorney,  
Territory of Alaska, First Division.  
Attorney for Defendant in Error.

## APPENDIX A.

*In the District Court for the District of Alaska  
Division Number One at Ketchikan.*

No. 264-KB.

UNITED STATES OF AMERICA,

vs.

DAN LOTT, Defendant.

No. 270-KB.

UNITED STATES OF AMERICA,

vs.

PETER JONES, Defendant.

DECISION OVERRULING DEMURRER.

JOHN RUSTGARD, United States Attorney,  
for the Government;

KAZIS KRAUCZUNAS, Esq., for the Defendants;

LYONS, District Judge:

Seven thirty p. m., May 9, 1912.

Court:

Section 218 of the Penal Code for the District of Alaska provides:

“The Common Law of England as adopted and understood in the United States shall be in force in said District, except as modified in this Act.”

It is contended on the part of the government that that section extends all of the common law relating to crimes to the District of Alaska except as the same



is modified by the Penal Code for the District of Alaska, that is, wherever the Code speaks it supercedes the comon law, but when it is silent regarding any act that was made criminal at common law such act is made criminal in Alaska by virtue of the extension of the common law to Alaska as provided in the section last quoted.

The defendant contends that Section 218 merely extends the common law to Alaska as an aid in construing the statutory law; that the only purpose of Section 218 is to extend the common law rule of interpretation to the District of Alaska.

If the defendant's contention be tenable it would seem that Section 218 is superfluous, for in the construction of statutory law or in the ascertainment of the meaning of any of the terms employed the court would look to the common law as the same has been construed by the courts without the common law actually being extended by specific legislation. The rules of interpretation which would be followed by the court in any event would be the rules adopted and adhered to by the English and the American courts. The original growth and meaning of the law and its terms must be ascertained where any doubt exists, by considering the original history and growth of the provisions of the statute as well as the language used by the legislature. In order, therefore, to give full force and effect to Section 218 it must be construed to extend the common law of England as adopted and understood in the United

States, except where the same is modified by statutory enactment, to the District of Alaska.

The defendant further contends that the complaint does not charge a crime at common law for the reason that it is not a crime to solicit or incite another to commit an offense similar to that of selling or giving intoxicating liquor to natives, and counsel for the defendant has cited many cases to sustain his position which from a superficial consideration apparently support his position. It is not a crime at common law to incite another to commit a misdemeanor and some courts have held that it is not a crime at common law to incite another to commit an offense which was not a felony at common law although it may have been made a felony by statute, and some courts have taken the position that the question as to whether the crime which the defendant solicits another to commit would be a felony or a misdemeanor is not material but whether such crime is one that is considered *malum in se* or *malum prohibitum*; but it seems to the Court that the better rule is the one which holds that whoever incites another to commit a felony is guilty of an offense regardless of whether or not the same has been recognized as a felony by common law or whether the same is made a felony by statute. The Congress of the United States has seen fit to make selling or giving intoxicating liquor to natives a felony. It is, therefore, in the eyes of the legislature a serious offense and while the same might not have been considered *malum in se* at one time, the evil which resulted

from an unrestricted sale of liquor to Indians was recognized by Congress many years ago; and while at one time the same was declared to be merely a misdemeanor, the character of the offense and the dangerous consequences resulting therefrom caused the legislature to declare such an act to be a felony. If the legislature has deemed such an act to be sufficiently serious and heinous as to make the same a felony, why should the Court treat it lightly and regard it as a trivial offense and, therefore, hold that the inciting or soliciting one to commit the same is not a crime although the inciting and soliciting of one to commit a crime much less dangerous to society should be considered an infraction of the law. It would appear, therefore, that the courts should rely on the legislature to say what are serious offenses and not to have recourse to the ancient common law to determine what was at one time considered *malum in se* or *malum prohibitum*.

For these reasons it is believed that the complaint states a crime under the laws of the District of Alaska and the demurrer is therefore overruled.













